IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| THE GIL RAMIREZ GROUP, L.L.C. and GIL RAMIREZ, JR., | § | |
| Plaintiffs, | § | |
| vs. | § | CIVIL ACTION 4:10-CV-04872 |
| HOUSTON INDEPENDENT SCHOOL DISTRICT, LAWRENCE MARSHALL, EVA JACKSON and RHJ-JOC, INC., | § | JURY REQUESTED |
| Defendants. | § | |

**PLAINTIFFS' RESPONSE TO DEFENDANT LAWRENCE MARSHALL AND MARSHALL & ASSOCIATES' SECOND MOTION FOR SUMMARY JUDGMENT (Dkt. 348)**

TO THE HONORABLE KEITH P. ELLISON:

COME NOW THE GIL RAMIREZ GROUP, L.L.C. ("GRG") and GIL RAMIREZ, JR. ("Ramirez"), Plaintiffs herein, who respond to the Second Motion for Summary Judgment (the "Motion") filed by Lawrence Marshall ("Marshall") and Marshall & Associates ("collectively, "Marshall") and in support whereof would respectfully show unto the Honorable Court as follows:

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## TABLE OF AUTHORITIES

### Cases

**Texas Statutes**

**Federal Rules and Statutes**

## STATEMENT OF THE NATURE AND STAGE OF PROCEEDING

This is a civil case alleging widespread corruption in the administration of construction contracts by one of the nation's largest school districts. The case was originally dismissed on Motion for Summary Judgment. An appeal ensured and the Court of Appeals reversed and remanded for consideration of fact issues. Now, Defendant Marshall has filed another Motion for Summary Judgment.

## STATEMENT OF ISSUES

1. Whether GRG's RICO claim against Marshall can survive on the merits.
2. Whether Marshall is entitled to qualified immunity from GRG's RICO claim.
3. Whether GRG adequately exhausted its administrative remedies.
4. Whether, if not otherwise barred, GRG's state tort claims can survive on the merits.

## STANDARD OF REVIEW

This Court may grant summary judgment on a claim only if the record shows there is no genuine issue of material fact and that "the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A party who moves for summary judgment has the burden of identifying the parts of the pleadings and discovery on file that, together with any affidavits, show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the movant carries this burden, then the burden shifts to the nonmovant to show that the Court should not grant summary judgment. *See id.* at 324-25. If the burden shifts, the nonmovant must set forth specific facts that show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

256 (1986). The nonmovant cannot rely on conclusory allegations, improbable inferences and unsupported speculation. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir.1993). The Court must review the facts and draw all inferences most favorable to the nonmovant. *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir.1986).

## SUMMARY OF THE ARGUMENT

There is ample evidence to support genuine issues of fact on Plaintiffs' RICO claim and state law claims against Marshall. Specifically, there is ample evidence to support the following propositions:

1. GRG's RICO claim against Marshall survives on the merits.
2. Marshall is not entitled to qualified immunity from Plaintiffs' federal claims.
3. GRG exhausted its administrative remedies, or, in the alternative, exhaustion was not required.
4. GRG's state tort claims survive on the merits.

## I.

## EVIDENCE/EXHIBITS

The following exhibits are attached hereto and incorporated herein to this response:

1. Joyce Moss Clay's Invoices to Fort Bend Mechanical and Fort Bend Mechanical's Check Stubs;
2. E-Mail from Medford to S. Medford dated February 4, 2009, Asking to Add Joyce Moss Clay to Payroll;

3. RHJ-JOC Fees Paid to Joyce Moss Clay;

4. JMC Invoices to RHJ-JOC;

5. Joyce Moss Clay's Answers to Interrogatories Nos. 2 and 4;

6. RHJ-JOC's Response to Second RFP from Plaintiff;

7. Larry Marshall's First Amended Interrogatory Answer;

8. Joyce Moss Clay Spreadsheet of Splitting Money with Larry Marshall from HISD Contractors;

9. IRS Form 1099 for year 2007 from Joyce Moss Clay to Larry Marshall for $39,375;

10. IRS Form 1099 for year 2008 from Joyce Moss Clay to Larry Marshall for $52,125;

11. IRS Form 1099 for year 2009 from Joyce Moss Clay to Larry Marshall for $59,175;

12. IRS Form 1099 for year 2010 from Joyce Moss Clay to Larry Marshall for $44,775;

13. Larry Marshall Tax Return 2007;

14. Larry Marshall Tax Return 2008;

15. Larry Marshall Tax Return 2009;

16. Larry Marshall Tax Return 2010;

17. HISD Agenda November 12, 2008;

18. RHJ-JOC Fires Joyce Moss Clay on November 19, 2008;

19. HISD Agenda August 13, 2009;

20. HISD Agenda January 14, 2010;

21. HISD Agenda May 13, 2010;

22. Fort Bend Mechanical Check to Larry Marshall Campaign for $2500 Dated June 17, 2008;

23. Medford Check to Larry Marshall Campaign for $25,000 Dated November 7, 2009;

24. Photo of Medford Check to Larry Marshall Campaign for $25,000 Dated November 7, 2009;

25. Copy of Back of Medford Check to Larry Marshall Campaign for $25,000 Dated November 7, 2009;

26. Campaign Finance Report from January 2009 to July 2009 with All Medford Family Making Contributions;

27. Reed Crane & Rigging Invoice for Work Performed by Fort Bend Mechanical at Joyce Moss Clay's House;

28. Crawford Electric Purchase Order and Ship Ticket for Work Performed by Fort Bend Mechanical at Joyce Moss Clay's House;

29. Veselka Report of Investigation of Undue Influence at Houston Community College Dated October 22, 2010;

30. Memo from General Counsel of Houston Community College Regarding Fort Bend Mechanical's Business Relationship with HCC Trustee Yolanda Navarro Flores' Family Member Dated April 13, 2010;

31. M Associate Cancelled Checks;

32. Houston Community College Employee Yvette Smith Interview Dated May 5, 2010;

33. Houston Community College Agenda for December 11, 2008;

34. Houston Community College Trustee Abel Davila Interview Dated June 30, 2010;

35. Houston Community College Chancellor Interview of Art Tyler Dated May 14, 2010, and July 8, 2010;

36. Contract Between HISD and GRG;

37. E-Mail from Elvis Eaglin to Himself Regarding How Conclusion Reached to Recommend KBR, RHJ-JOC and Fort Bend Mechanical to Administration Dated October 24, 2008, at 3:45 p.m.;

38. Agreement Among JOC Contractors to Using Same Pricing Coefficient As of July 30, 2009;

39. E-Mail from Willie Burroughs to Elvis Eaglin Regarding the Use of a Single Pricing Coefficient for All JOC Contractors Dated October 14, 2009;

40. E-Mail from Elvis Eaglin to Willie Burroughs Regarding Renewal of Existing JOCs by Board Dated October 15, 2009;

41. John Gerwin Audit Report Dated August 24, 2009;

42. E-Mail from Bruce Green Regarding the Need to Terminate RHJ-JOC So They Can Reapply to the New 2010 JOC RFP Dated February 16, 2010;

43. E-Mail from Travis Stanford Regarding the Board Placing Pressure on Richard Lindsay to Release the RFP for JOC Program Dated February 27, 2008;

44. Consultant Agreement Between RHJ-JOC and Joyce Moss Clay Dated October 2003;

45. Fort Bend Mechanical Credit Card Charge for Willie G's for $111.34 Marked "L. Marshall" on March 4, 2009;

46. Medford Credit Card Charge for Triple A Restaurant for $40.86 Marked "Marshall" on December 17, 2008;

47. Affidavit of Gil Ramirez, Jr.

48. Medford Credit Card Charge for Coco Moka for $14.49 Marked "L. Marshall" Dated December 10, 2008;

49. E-Mail from Richard Lindsay to Elvis Eaglin Regarding Expiration Date of RHJ-JOC's Contract Dated September 11, 2009;

50. Expert Report of Ransom Cornish;

51. Elvis Eaglin E-Mail to RHJ-JOC to Change Coefficients Dated June 5, 2008, at

8:47 a.m.;

52. Elvis Eaglin E-Mail to Fort Bend Mechanical to Change Pricing Coefficients Dated June 5, 2008, at 8:48 a.m.;

53. E-Mail Chain Amount Selection Committee Members for 2010 JOC Program Objecting to the Selection of Jamail & Smith, But Elvis Eaglin Defends Selection Dated April 12, 2010;

54. E-Mail Correspondence Between Elvis Eaglin and Willie Burroughs Regarding Bruce Green as a Member of the Selection Committee Dated February 10, 2010;

55. Evaluation of JOC Contractor Applicants' Financials and MWBE Participation Dated April 6, 2010;

56. Evaluation Summaries of All 2010 JOC Contractor Applicants Dated April 16, 2010;

57. Fort Bend Mechanical Payments to Joyce Moss Clay;

58. Score Sheets for Fort Bend Mechanical for 2010 JOC;

59. GRG 2009 Tax Return;

60. GRG's List of Relevant and Completed JOC Projects in 2010;

61. HISD's Review of 2009 JOC Performance;

62. E-Mail from Elvis Eaglin Regarding the Inspector General's Insistence to Remove 2% Fee in 2010 RFP Dated January 28, 2010;

63. E-Mail from Elvis Eaglin to Richard Lindsay Regarding Terms of Jamail & Smith JOC Contract Dated October 9, 2008;

64. E-Mail from Richard Lindsay to Robert Moore, John Gerwin and Elvis Eaglin Attaching Letter Signed by Horizon and GRG Agreeing to Use Same Pricing Coefficient Dated January 14, 2009, at 8:09 a.m.;

65. JM Clay & Associates Bank Statements;

66. E-Mail Chain Regarding KBR Not Having a Signed Contract But Given $724,306.27 in Work from HISD Dated January 12, 2010;

67. Gerwin's Memorandum Regarding Richard Lindsay's Explanation on the JOC Selection Made in 2008 Dated November 12, 2009;

68. E-Mail from Mark Miranda to Elvis Eaglin Regarding Surprise That the Four JOC Contractors Agreed to Single Pricing Coefficient So Quickly Dated April 26, 2010, at 4:42 p.m.;

69. E-Mail from Pottinger to Elvis Eaglin and Bob Fazarkerly Dated April 26, 2010;

70. E-Mail from Elvis Eaglin Regarding the Rankings of Potential JOC Contractors Based on Different Pricing Coefficient Dated April 27, 2010, at 8:15 a.m.;

71. References Obtained on RHJ-JOC Dated October 8, 2008;

72. E-Mail from Elvis Eaglin to Richard Lindsay Regarding the Closing Date of the JOC RFP Was May 21, 2008, Dated June 5, 2008;

73. E-Mail from Jeanette Graham to Elvis Eaglin and Tanya Savoie Regarding RHJ-JOC Had Only One JOC Job at HISD in 2009 Dated January 22, 2009;

74. E-Mail from John Gerwin to Robert E. Moore Regarding Replacement JOC Contractor Not Using Their Own Scope and Proposal Dated March 4, 2010;

75. E-Mail from Travis Stanford of the Construction and Facilities Department Regarding $1 to $1.5 Million a Year in JOC Work Dated March 26, 2010;

76. E-Mail from Willie Burroughs That the Bond Office Expected $5 Million a Year in Work in the JOC Program Dated March 26, 2010;

77. Larry Marshall Calendar Entry "Ft. Bend HVAC" for October 1, 2008;

78. Larry Marshall Calendar Entry "Contract / JMC/Accel" (Accel Building Services owned by Ricardo Aguirre) for August 10, 2008;

79. Larry Marshall Calendar Entry "Linebarger/JMC" for October 21, 2008;

80. Larry Marshall Calendar Entry "Fort Bend Mech." for December 24, 2008;

81. Larry Marshall Calendar Entry "Super Bowl Day (Tampa)" for February 1, 2009;

82. Larry Marshall Calendar Entry Removed for February 3, 2008;

83. Larry Marshall Calendar Entry “Ft. Bend / Pete” for March 3, 2009;

84. Larry Marshall Calendar Entry Removed for February 19, 2009;

85. Larry Marshall Calendar Entry “Pete @ Willie G” for January 22, 2009;

86. Letter from RHJ-JOC to Joyce Moss Clay Rehiring Her on April 30, 2010;

87. Joyce Moss Clay Agreement with Fort Bend Mechanical Dated January 30, 2009;

88. HISD Procurement Statement;

89. Pottinger Affidavit;

90. Larry Marshall Calendar Entry “R. Richardson 615-456-XXXX (CEP) February 2007 Margin Notes;

91. Larry Marshall Calendar Entry “CEP Event” on November 2, 2007;

92. Larry Marshall Calendar Entry “CEP@Beechnut” on February 3, 2010;

93. Joyce Moss Clay Resume;

94. E-Rate Whistleblower Lawsuit Richardson v. Analytical Computer Services Excerpts of Third Amended Complaint;

95. Houston Chronicle Article Dated July 27, 2010, Titled “HISD Gifts: Rocket Tickets, Phones, Fishing Trips”;

96. Larry Marshall Calendar Entry “AAA/Scott (ACS)” April 3, 2007;

97. Larry Marshall Calendar Entry “AAA Scott” September 18, 2007;

98. Larry Marshall Calendar Entry “AAA(Scott) 832-250-8914” on October 15, 2007;

99. Larry Marshall Calendar Entry “Four Seasons Eva / Abel / Scott” on November 7, 2007;

100. Larry Marshall Calendar Entry “AOP /Scott” for December 12, 2007;

101. Larry Marshall Calendar Entry “Scott B.” for January 24, 2008;

102. Larry Marshall Calendar Entry “AAA Scott” on February 22, 2008;

103. Larry Marshall Calendar Entry “Schedule Scott with KSA” in the Margin Above March 22, 2010;

104. Joyce Moss Clay Business Bank Statement April 2009;

105. Larry Marshall Calendar Entry “Eva / Game” on February 4, 2007;

106. Larry Marshall Calendar Entry “Brennans (Eva)” on May 9, 2007;

107. Larry Marshall Calendar Entry “Eva Mike Four Seasons” on July 26, 2007;

108. Larry Marshall Calendar Entry “Good Co. (Eva Paula)” on September 29, 2007;

109. Larry Marshall Calendar Entry “Four Seasons Eva Jarvis” on May 27, 2008;

110. Larry Marshall Calendar Entry “RHJ@Papp” on May 18, 2009;

111. Larry Marshall Calendar Entry “Darryl / Eva” on July 25, 2009;

112. Declaration of Elvis Eaglin;

113. Disclosure of Interest Form July to December 2008;

114. Disclosure of Interest Form July to December 2007;

115. Disclosure of Interest Form January to June 2008;

116. Campaign Finance Report January 2008 to July 2008;

117. Campaign Finance Report July 2008 to January 2009;

118. Campaign Finance Report January 2009 to July 2009;

119. Campaign Finance Report October 2009 to December 2009;

120. Campaign Finance Report December 2009 to January 2010;

121. Campaign Finance Report January 2010 to July 2010;

122. Campaign Finance Report July 2010 to July 2011;

123. Memo from Stanford to Lindsay on Life Safety Issues Dated March 12, 2009;

124. E-Mail to Lindsay from GRG on Awarded Projects Dated October 12, 2009;

125. E-Mail from Lindsay to Burroughs on Slow Start Dated May 1, 2009;

126. Lindsay Written Response to Gerwin Audit;

127. 2008 JOC Recommendations Approved by Board;

128. Houston Chronicle Article Titled "Contracts Bring Big Business for Well Connected Firm" April 14, 2012;

129. 2008 FBM Conflict of Interest Form Incomplete;

130. 2010 FBM Conflict of Interest Form Not Completed at All;

131. Secretary of State Office General Works Management;

132. Agenda February 2009 ABM Contract Award;

133. Marshall Calendar Entry "Fogo Ricardo 281-685-9352" July 17, 2008;

134. Marshall Calendar Entry "Contract / JMC / Accel" August 10, 2008;

135. Marshall Calendar Entry "Ricardo Fogo" September 24, 2008;

136. Marshall Calendar Entry "Ricardo @ Fogo" November 5, 2008;

137. Marshall Calendar Entry "Ricardo" August 7, 2009;

138. Marshall Calendar Entry "Ricardo El Tiempo Richmond" September 25, 2009;

139. Marshall Calendar Entry "Ricardo @ El Tiempo Richmond" March 10, 2010;

140. Marshall Calendar Entry "ABM Holler" February 9, 2007;

141. Consultant Agreement between Accel and ABM;

142. Accel Paid Invoices Submitted to ABM I

143. Accel Paid Invoices Submitted to ABM II;

144. Campaign Finance Report September 2009 to October 2009;

145. Marshall Campaign Bank Statements July 2009 to September 2009;

146. Marshall Campaign Bank Statements October 2009 to November 2009;

147. Marshall Campaign Bank Statements December 2009 to February 2010;

148. Marshall Campaign Bank Statements March 2010 to July 2010;

149. Texas Watchdog Article Titled "School Board to Take Final Vote on Ban on HISD Employees Taking Gifts from Vendors";

150. Deposition of Frank Watson on October 25, 2012;

151. Deposition of Elneita Hutchins-Taylor on July 9, 2013;

152. Deposition of Reginald Mack on October 25, 2012;

153. Deposition of Larry Marshall on October 16, 2012;

154. Deposition of Larry Marshall on November 28, 2012;

155. Deposition of Richard Patton on June 4, 2013;

156. Deposition of Eva Jackson on September 13, 2012;

157. Deposition of Joyce Moss Clay on September 11, 2012;

158. Deposition of Dr. Abelardo Saavedro on December 12, 2012;

159. Deposition of David "Pete" Medford on September 12, 2012;

160. Deposition of Elvis Eaglin on July 16, 2013;

161. Deposition of John Gerwin on September 19, 2012;

162. Deposition of Eva Jackson on May 7, 2008;

163. Deposition of Myrna Saavedra on February 19, 2013;

164. Medford – Dolcefino Conversation June 4, 2013;

165. Deposition of Sharon Medford on March 7, 2013;

166. Deposition of Melinda Garrett on October 23, 2012;

167. Deposition of Issa Dadoush on October 18, 2012;

168. Deposition of Daryl Bailes on December 6, 2012;

169. Deposition of Stephen Pottinger on June 29, 2013;

170. Deposition of Ricardo Aguirre on September 20, 2012;

171. Deposition of Terry Grier on July 17, 2003;

172. Deposition of Robert Sands on July 10, 2013;

173. Deposition of Robert Sands on July 30, 2013;

174. Deposition of John Thomas on October 17, 2012;

175. Deposition of Rodney Watson on June 3, 2013;

176. Deposition of Ken Huewitt on July 9, 2013;

177. Deposition of Robert Moore on July 16, 2013;

178. Deposition of Kermit Falgout on August 12, 2013;

179. Deposition of Elneita Taylor Hutchins on August 12, 2013;

180. Deposition of Gil Ramirez, Jr. on June 19, 2012;

181. HISD Gives Marshall Living Legend Award on February 10, 2012;

182. Medford E-Mail to Dolcefino May 29, 2013;

183. Medford E-Mail to Dolcefino June 1, 2013;

184. Medford E-Mail to Dolcefino June 3, 2013;

185. Medford E-Mail to Dolcefino June 5, 2013;

186. Houston Chronicle Article Titled, “School Board Members Change Mind on Ban” Dated January 13, 2005;

187. Audit of Inspectors General Office;

188. HISD Legal Expenses thru July 9, 2013;

189. FBM v. HISD Original Petition and Non-Suit;

190. RHJ-JOC Project List with HISD;

191. Disclosure of Interest Form, Second Half 2008;

192. Disclosure of Interest Form, First Half 2009;

193. Disclosure of Interest Form, Second Half 2009;

194. Disclosure of Interest Form, First Half 2010;

195. Disclosure of Interest Form, Second Half 2010;

196. Disclosure of Interest Form, First Half 2011;

197. Disclosure of Interest Form, Second Half 2011;

198. Disclosure of Interest Form, First Half 2012;

199. Summary of Unreported Checks From Marshall Campaign Account June 2009 to July 2010;

200. FBM Version of Invoice for Generator June 17, 2010;

201. Clay’s Version of FBM Invoice for Generator June 17, 2010;

202. Purposely Omitted;

203. JOC Contractors Install E-Rate Cables;

204. Ken Wilson Expert Report;

205. Medford Long Recording;

206. Medford Short Introduction Recording;

207. Business Records Affidavit - Houston Community College;

208. Business Records Affidavit - Wayne Dolcefino; and

209. Business Records Affidavit - ABM Janitorial.

210. Audit of HISD Bond Program

211. HISD Audit Report on Job Order Contracting 2015

## II.
## FACTS

Trustee Larry Marshall, was an elected public official who, along with others at HISD, regularly abused his position of trust by placing his own interests before those of the students and employees of the school district. As a member of the Board of Education, he was charged with a duty of loyalty in overseeing the expenditures of local tax dollars, bond money and federal funds for the benefit of the students and employees of the Houston Independent School District. Persons or companies who dare to interfere with HISD's pay to play system are terminated, forced to resign or no longer awarded contracts at HISD. HISD as an organization knowingly participated with Marshall and other board members' scheme of pay to play.

GRG lost its job order contract, the "JOC contract", with HISD when its owner, Gil Ramirez, Jr., refused to pay money to Marshall. Two of the companies known to

have paid money to Marshall, FBM and RHJ, received JOC contracts as a result. Though this case centers on the JOC contracts issued in 2008 and 2010, the evidence revealed in discovery demonstrates numerous other contracts are awarded based on bribery and influence, but not merit. Unfortunately, this condition appears to continue at the district as many of the players and board members involved remain at HISD. [1] Putting this case to trial will finally bring this situation to light.

This case was originally filed on December 7, 2010. After voluminous motions and a thorough appeal, the Court of Appeals has returned causes of action for trial. The Court should reject Marshall's latest dilatory efforts to head off trial and proceed to take evidence. All of Marshall's protestations of avoidance and official immunities have either been rejected outright by the Court of Appeals or are foreclosed by the Court of Appeal's analysis. This case, for all involved, but not the least the public at large, needs to come to an end. The Court should decline Marshall's invitation to weigh the evidence and instead should put this case to the jury to determine once and for all the relevant fact issues.

This Court, from earlier briefing and from the Court of Appeals decision, is well

[1] HISD's current superintendent announced his resignation after it was revealed that $211 million is short from the most recent bond issuance. *See* http://www.chron.com/news/education/article/Grier-out-as-Houston-ISD-superintendent-6496621.php (accessed January 4, 2016). Even HISD's own internal auditor has concluded that HISD's procurement practices lack competitiveness in the bidding process. *See* Ex. 210 and 211. *See also,* http://www.houstonchronicle.com/news/education/article/Grier-auditor-clash-over-HISD-bond-audit-findings-6582948.php and http://www.houstonchronicle.com/news/houston-texas/houston/article/Audit-finds-weakness-in-HISD-bond-management-6567378.php (accessed January 4, 2016). The internal audit specifically observed continued issues with HISD's JOC award process that continue to this day. *See* Ex. 211 at pp. 4-6. *See also* http://www.houstonchronicle.com/news/education/article/Audit-finds-HISD-exceeded-contract-limits-without-6494427.php (accessed January 4, 2016). In fact, many of the flaws noted in current JOC awards were present in the JOC re-bid process challenged in this lawsuit. An external audit of HISD bidding processes is now on order. *See* http://www.houstonchronicle.com/news/houston-texas/houston/article/HISD-board-seeks-audits-6488711.php(accesssed January 4, 2016).

aware of the facts and circumstances surrounding this case. The facts are set forth below again in order to highlight the genuine factual issues in this case (and ensure their inclusion in any future appeal).

## A. Marshall Had a History of Pay to Play with HISD Vendors

### 1. From the Beginning of His Service on the HISD Board, Marshall Used His Position to Earn Lucrative Fees in Order to Influence Official HISD Actions and HISD Officers, and Staff Knowingly Assisted

Marshall was elected to serve as a member of the Board of Education of the Houston Independent School District in 1997. In 1999, he was first elected president of the Board. Marshall's first known attempt at improperly influencing HISD business dates back to 1999.

**Year 1999**

Frank Watson worked for HISD from 1968 to 2000. Ex. 150, p. 11, ll. 3-5. His employment record was unblemished. *Id.*, p.11, ll. 6-11. HISD promoted him to Assistant Superintendent of Employee Benefits and Claims Management in the 1980s. *Id.*, p.15, ll. 10-14. In 1999, Watson received a call from then Superintendent Rod Paige requesting Watson meet with Marshall. *Id.*, p. 24, ll. 20-25, p. 15, ll. 1-4. Dr. Paige instructed Watson to help Marshall in any way possible. *Id.* In the meeting, Marshall requested Watson to assign all employees who had not designated a primary care physician to a physician's group called Peoples First. *Id.* p. 28, ll. 12-25, p. 29, ll. 1-23. Marshall was a consultant for Peoples First for a fee of $25,000 a year. *Id.*, p. 39, ll. 3-6, Marshall also told Watson at this meeting, "I'm doing a piece with some guys in North

Carolina or South Carolina, and I'm not so sure that they are quite as up on this benefits stuff as you are, and we might be able to work out something with them." *Id.*, p. 44, ll. 18-23. Watson inferred from the comment that he, too, could be a paid consultant if he did as Marshall instructed. *Id.*, p. 45, ll. 6-15. Watson testified Marshall was very stern and pointed in his manner and tone in the meeting. *Id.*, p. 29, ll. 24-25, p. 30, ll. 1-8.

In response to Marshall's demand, Watson researched and consulted with in-house counsel and his supervisor on the issue. *Id.* p. 45, ll. 16-19, p. 46, ll. 2-14. Everyone concluded that assigning the undesignated employees to People's First would amount to a breach of contract with another company. *Id.* p. 45, ll. 20-25, p. 46, ll. 1, 2-23. Watson also believed it to be an illegal act to assign an employee to a certain physician without the employee's consent. *Id.*, p. 33, ll. 23-25, p. 34, ll. 1-25, p. 35, ll. 1-25. Watson reported this information back to Dr. Paige and assumed the matter was closed. *Id.*, p. 47, ll. 15-25, p. 48, ll. 1-2.

A few weeks later, Watson received a call from Marshall inviting him to breakfast at Buffalo Grill with Dr. Kiles, the owner of People's First. *Id.*, p. 46, ll. 3-10. At this meeting, Marshall and Dr. Kiles requested Watson move undesignated employees to People's First. *Id.*, p. 49, ll. 6-8. Watson explained he had responded to the superintendent regarding the matter and assumed the superintendent agreed with his position (to not move the employees to People's First). *Id.*, p. 49, ll. 9-14.

However, Marshall and Dr. Kiles would not take no for an answer. Watson was assailed with telephone calls and meeting requests by Dr. Kiles, Marshall and even Dr.

Paige. *Id.*, p. 49, ll. 11-24, p. 53, ll. 8-25, p. 54, ll. 1-25, p. 55, ll. 1-20. At one meeting, Dr. Kiles even offered to reward Watson personally if he were to make the change. p. 50, ll. 1, p. 51, ll. 1-19. Watson continued to explain why it would be a breach a contract with another company if the employees were moved to People's First. *Id.*, p. 54, ll. 20-25, p. ll. 1-20. Dr. Paige appeared to express frustration with Watson's refusal to transfer the employees to People's First. *Id.*, ll. 10-13.

Watson felt obligated to attend the meetings with Dr. Kiles and Marshall because Dr. Paige asked him to help Marshall, the Board President. *Id.*, p. 57, ll. 2-9. Dr. Kiles continued to call Watson at home repeatedly. *Id.*, p. 57, ll. 10-18. Dr. Paige even called Watson at home telling Watson to do whatever had to be done to get Dr. Kiles off Dr. Paige's back. *Id.*, p. 57, ll. 10-24. Shortly thereafter, Dr. Paige asked Watson to remove all marketing materials for all physicians' groups from the employee benefits package. *Id.*, p. 62, ll. 5-25, p. 63, 1-4. Then, Dr. Paige asked Watson if he would provide only the marketing materials for People's First in the employee benefits information packet. *Id.*, p. 63, ll. 5-23. Watson informed Dr. Paige that it was outside normal procedure to provide a marketing packet regarding only one and not all of the physician's groups. *Id.* Dr. Paige stared silently at Watson for a long time then left Watson's office. *Id.* p. 63, ll. 24-25, p. 64, ll. 1-22. Watson complied with Dr. Paige's initial request to remove all the marketing materials but did not follow the request to insert only the People's First marketing material. *Id.* p. 64, ll. 11-22.

Shortly after enduring the series of meetings over the People's First matter,

Watson suffered severe chest pains and was diagnosed with heart issues. *Id.*, p. 59, ll. 22-25, p. 60, ll. 1-25. Watson's doctor ordered him to take six months medical leave. *Id.* p. 61, ll. 23-25. When Watson returned from medical leave, he learned that someone stuffed the employee benefits packets with only the People's First marketing material enclosed. *Id.* p. 64, ll. 24-25, p. 65, ll. 1-22. Watson also learned that his contract was prematurely and immediately terminated, and his personnel file was marked "do not rehire". *Id.*, p. 69, ll. 15-25, p. 70, ll. 1-25, p.71, ll. 1-11.

Mr. Jimenez, Watson's boss, supported Watson's refusal to follow Marshall's orders to transfer the employees to People's First. *Id.*, p. 67, ll. 8-25, ll. 1-4. Mr. Jimenez resigned a week later after defending Watson's actions and stating Marshall should not have asked Watson to transfer the employees. *Id.* Watson believed Marshall prematurely ended his spotless 32-year career and slandered his reputation because Watson refused to perform an illegal act, which would have subjected the school district to a lawsuit. Many years and legal fees later, HISD paid Watson $317,000 to settle the lawsuit and took steps to keep the matter confidential. Ex. 151, p. 30, ll. 22-25.

### 2. The Frank Watson Affair Teaches HISD Officers and Personnel That Failing To Heed Marshall Ensures a Shortened Tenure at HISD

What happened to Watson made an impression on former HISD employee Reginald Mack. Mack testified in his deposition that he was aware of Watson's story and believed Watson was fired because he would not follow orders from Marshall. Ex. 152, p. 48, ll. 1-11. Mack also testified in his deposition that there was not one person he

knew of at HISD who would ever speak freely about Marshall without the fear of being terminated. *Id.*, p. 85, ll. 19-25, p. 86, ll.

### 3. New Ethics Rules Require Marshall to Alter His Pay to Play Scheme

**Year 2000**

In 2000, Marshall was hired as a consultant with Nashville-based Community Education Partners, also known as CEP, another vendor for HISD. Ex. 153, p. 96, ll. 9-25, p. 97, ll. 1-11. Shortly after a change in ethics policy that prohibited Marshall's direct involvement with CEP, Joyce Moss Clay started handling the CEP consulting. *Id.* p. 98, ll. 23-25, p. 99, l. 1. Marshall denied in deposition testimony that he ever performed any more work for CEP. *Id.* p. 99, ll. 10-12. Marshall also denied he ever received any payments from Clay for her CEP work. *Id.*, p. 99, ll. 2-9. However, Marshall started receiving a share of Clay's consulting income shortly after he severed his business relationship with CEP. Ex. 154, p. 295, ll. 7-14. According to his personal calendar, Marshall also continued to meet with CEP. Ex. 90-92. Moreover, Marshall continued his contact with Randle Richardson, the CEO of CEP, as evidenced by the CEO's name and number in his personal calendar. Ex. 92. It is not apparent from Clay's work history how she was of assistance to CEP as a consultant. Ex. 93. Also, the financial records indicate Marshall received a portion of CEP's Payments to Clay from 2009 to 2010. Ex. 104.

## B. Marshall Put in Motion a Scheme to Profit from Many of the HISD Construction and Services Contracts

**Year 2003**

RHJ is a JOC contractor in the Houston area. It is owned by Eva Jackson. The company that evolved to be RHJ was an asbestos abatement company owned by Eva Jackson's husband. *Id*., p. 7, 11. 16-25, p. 8, ll. 1-5, p. 30, ll. 19-23. The asbestos abatement company had previous contracts for services with HISD. *Id.*, p. 46, ll. 18-24. In 2003, the predecessor company to RHJ hired Joyce Moss Clay for $2500 to $3000 a month to provide moral support to Eva Jackson. Ex. 3, 4 and 38. Specifically, Eva Jackson testified in her deposition:

> Q. When you executed that agreement with Ms. Clay that's in Exhibit 1, what were you expecting her to do in terms of rendering services?
> A. I expected her to provide me with moral support.

Ex. 156, p. 32, ll. 13-17.

> Q. Okay. And tell me more specifically what that means to you.
> A. To me, moral support is just having someone to talk to about issues that – and representation that was foreign to me or that I just needed support, just a sounding board, to hear, to share, to someone that had that level of peace and wisdom and calmness, and just like you would have a spiritual advisor, moral support.

Ex. 156, p. 32, ll. 20-25, p. 33, ll. 2.

According to Clay's testimony, she helped RHJ apply problem-solving techniques to understand why it was not awarded a contract.

> Q. First of all, I'd like to understand what services did you render for RHJ, starting in 2003?
> A. Coaching, strategic planning. Having been a teacher, I was accustomed to in-basket opportunities for improvements, so we can do some what-if examples with them, with the client to help them build their own capacity to enter markets, or to design the way that they wanted to go.

Ex. 157, p. 10, ll. 3-10

.

Q. And when you say "we", you mean you and Mr. Marshall?
A. Yes.

*Id.*, p. 11, ll. 20-22.

Q. Okay. So what I'm understanding you've told me is that for $2,000 a month, starting in 2003 that you and Mr. Marshall shared, that you guys advised her, based on your experience, on how to —
A. Increase her market skills.
Q. — increase her market skills through teaching — through that you know as a teacher, in-baskets and what-ifs.
A. Uh-huh.
Q. Is that a "yes"?
A. That's yes.
Q. Now what else? What else am I missing that y'all would — services you would provide to her?
A. Those were basic services that I can recall at this point.
Q. Is there anything else?
A. Main thing. No.

*Id.*, p. 14, ll. 9-2, p. 15, ll. 1-3.

As set forth above, Jackson claimed she paid Clay $2000 to $3000 a month for moral support. Clay claimed she was paid by Jackson to determine why she failed in obtaining contracts. However, when RHJ failed to win a JOC contract in November 2008 from HISD, Jackson claimed they never spoke about it. Specifically, Jackson testified that:

Q. Okay. Do you have any opinion as to why RHJ was taken out of the running — or I'm sorry, did not receive the [HISD] JOC contract in 2008?
A. I have no opinion.
Q. Never wondered about it?
A. No opinion.
Q. Did you ever ask Ms. Clay?
A. No.

Ex. 158, p. 52, ll. 3-10.

> Q. And why didn't you ask Ms. Clay her opinion on why you didn't get the contract?
> A. Because that wasn't our relationship.
> Q. Okay. Did you discuss it with her because she was there for moral support and say, "Gosh, I'm so upset," or "I'm concerned why I didn't get the contract"?
> A. No.

*Id.* p. 53, ll. 9-15.

Clay testified there were no regularly scheduled meetings, no written work product, no e-mail correspondence and no time logs. Neither Clay nor Jackson can even give an estimate of how often in a month or a year they would meet or confer. Ex. 5, 6, Ex. Id., p. 11, ll. 3-25, 1-7 and Ex. 156, p. 34, ll. 1-7. The invoices Clay mailed to RHJ were the identical invoices every month. Ex. 4. The invoices never contained any detail regarding Clay's alleged services or time. Ex. 4. Despite the lack of information for services rendered, RHJ mailed a check to Clay every month for payments in amounts ranging from $2000 to $3000. Ex. 3 and 65. Clay then paid Marshall 25 to 75 percent of all fees collected from RHJ. Ex. 157, p. 9, ll. 5-25, p. 10, ll. 1-4. The fees ranged from $2000 to $3000 a month. Ex. 8 and 65.

In contrast to the lack of services Clay provided, Jackson attended social events and meetings regularly with Marshall. According to Marshall's calendar, Marshall and Jackson met at the Four Seasons Hotel, restaurants and her home at least nine times from 2007 to 2009. Ex. 99, 101, 105, 106, 107, 108, 109, 110 and 111. Jackson also appointed Marshall as a director of a non-profit organization she started called

International Faith Based Foundation. Ex. 156, p. 41, ll. 18-23, p. 42, ll. 5-12. Jackson testified she had "a business – I wouldn't call it business. I would say mentor kind of relationship with (Marshall)." *Id.* p. 36, 22-25, p. 37, ll. 1-2.

However, incredibly, Jackson denied in her deposition testimony that she knew Marshall was being paid a portion of the fees received by Clay. *Id*. 156, p. 38, ll. 1-6. Jackson denied paying any money to Marshall "for any services or anything at all". *Id.* p. 38, ll. 7-10.

**Year 2004**

Dr. Saavedra testified Marshall brought Eva Jackson and Eva Jackson's husband, Richard Jackson, to Dr. Saavedra's Christmas party in December 2004. Ex. 158, p. 28, ll. 10-25. Dr. Saavedra explained he believed Marshall's act of bringing the Jacksons to the Christmas party was to make it known to the superintendent and senior staff that Marshall was very close with the Jacksons. Ex. 158, p. 29, ll. 8-21.

**1. <u>Marshall Used Federal E-Rate Funds As Another Opportunity to Expand His Pay to Play HISD Scheme</u>**

**Year 2006**

E-Rate is a federally funded program administered through the Federal Communications Commission. Ex. 155, p. 11, ll. 10-22. E-Rate provides millions of dollars of federal funds to HISD every year. Id., p. 14, ll. 11-25, p. 15, ll. 1-6. In 2006, the FCC suspended millions of dollars a year in technology funding due to allegations that HISD's employees and board members were accepting gifts from E-Rate vendors. *Id*., p. 16, ll 21-25, p. 17, ll. 1-25, p. 18, ll. 1-8. Marshall was one of the board members

alleged to have accepted gifts from the E-Rate vendors according to an October 19, 2009, filing in a lawsuit filed in the Southern District of Texas by a whistleblower. Ex. 94.[2] After years of investigation and the loss of approximately $105 million dollars in E-Rate funding, HISD finally settled the E-Rate case by agreeing to pay an $850,000 fine and hire a full time E-Rate compliance officer to ensure neither employees nor board members accept anything of value from E-Rate vendors. Ex. 155, p. 10, ll. 4-15.

**Year 2007**

Despite the fact that HISD was losing millions of dollars a year in technology funding because of allegations of gift giving by affiliates of Analytical Computer Services, also known as ACS, Marshall started a business relationship with Scott Blankenship, one of ACS's principals in 2007. Ex. 96-103. Scott Blankenship worked as a representative of two of the E-Rate vendors implicated in the well-publicized scandal involving Dallas Independent School District and HISD. *Id.*, p. 19, ll. 2-15, Ex. 95. Clay's business bank records show Blankenship paid Clay between $1000 to $2000 regularly in 2008 and 2009. Ex. 65. The same bank records show Clay would then immediately pay Marshall 75 percent of the Blankenship fee. Ex. 65. On Clay's bank records, she records the deposits from Blankenship by his name but uses the number "07" when referencing him on the memo line of the check given to Marshall. *Id.* In addition,

[2] Plaintiffs attach as Exhibit 94 pages 1, 18 and 51 of the Third Amended Complaint for Cause No. H-05-3836; *Richardson v. Analytical Computer Services, Inc.,* Filed in the United States District Court for the Southern District of Texas – Houston Division. Paragraph 58 of the Third Amended Complaint described the allegations against Trustee Marshall in the E-Rate case. Plaintiffs ask the court to take judicial notice of this pleading in its files.

Scott Blankenship is identified as "Blankenship" on the spreadsheet prepared by Clay. Ex. 8. Clay assigned Blankenship customer number 040507 on the spreadsheet. *Id.*

Marshall's calendar and deposition testimony established that Marshall met regularly with Blankenship from 2007 through at least 2010. Ex. 96-103. Marshall confirmed that the calendar entries marked as "Scott" referred to Scott Blankenship of ACS. Ex. 154, p. 403, ll. 11-20. It is clear Marshall knew Scott Blankenship was employed by the disreputable E-Rate vendor, ACS, because he marks his calendar for April 3, 2007, "12:30 p.m. AAA/Scott (ACS)". Ex. 96.

Marshall's personal calendars from 2007 through 2010 show meetings with Scott Blankenship. On November 7, 2007, Marshall's calendar shows a 9:00 a.m. meeting at the Four Seasons with "Eva / Abel / Scott". Ex. 99. Marshall explains in his deposition testimony that the meeting was with Eva Jackson; Abel Davila, Chairman of the Houston Community College; and Scott Blankenship. Ex. 154, p. 411, ll. 5-16. Similarly, the next month, Marshall attended a meeting with A.O. Phillips and Scott Blankenship. Ex. 100, Ex. 154, p. 414, ll. 2-8. A.O. Phillips is an engineering company who was had a contract for many years with HISD. A.O. Phillips also paid money to JMC who in turn paid a portion of it to Marshall. Ex. 8.

### C. Marshall Profits in the Newly Expanded JOC Program in 2008

**Late 2007 / Early 2008**

In late 2007 or early 2008, the Board voted to hire additional Job Order Contractors ("JOC") to supplement the current and only Job Order Contractor, Jamail &

Smith. Ex. 43. (Medford claims the decision to expand the JOC program was because "we" made HISD do it. Ex. 164, p. 27.) Job Order Contracting is a way for an organization to complete numerous, commonly encountered projects quickly and easily through long-term contracts with pre-approved contractors. Ex. 47. As noted in footnote 1, supra, JOC contract awards remain a major problem at HISD.

The Request for Proposal to add additional JOC contractors was published in March 2008, and bids were due in May 2008. Ex. 43 and 72. GRG applied to be a JOC contractor along with many other in-state and out-of-state companies. Ex. 41. GRG spent tens of thousands of dollars preparing for the opportunity to be an HISD JOC contractor. Ex. 47.

## D. FBM Enriches Marshall and Receives Million Dollar Contracts

### Year 2008

### 1. Medford Pays Marshall Directly in Cash

FBM is a local non-minority owned HVAC and construction company operated by Pete Medford. Ex. 127. In Medford's meeting with Wayne Dolcefino, a public relations consultant, Medford tells Dolcefino he started giving money to Marshall in 2008. Ex. 164, p. 46, ll. 19-21. Medford stated:

> Mr. Medford: You know, it's never – he never comes out and says it. He just – you know, it's like, "Hey Larry, I brought you a present for your birthday," you know, and then he just – you know, he comes here, and I give him an envelope. You know he comes into my office, we shut the door, and I give him an envelope. And he walks out with an envelope. He never – he never says how much or anything, but if you don't -- if you

> don't know where that – that line is, Wayne, you never – nothing ever gets done.
> Mr. Dolcefino: How much – how do you know – I think what you said was $9,000?
> Mr. Medford: $9,000.

*Id.*

Ultimately, Larry Marshall received $140,000 to 150,000 in cash from Medford, not including campaign contributions. *Id.* at p. 53. According to Medford, Marshall passed along some of the money to key HISD staff. *Id.*, p. 61.

Also in 2009, Pete Medford, owner of FBM, paid for Larry Marshall and Clay's husband to attend the Super Bowl in Tampa, Florida. Ex. 154, p. 314, ll. 17-25, p. 315, p. 315, ll. 1-21., p. 316, ll. 22-25, p. 317, ll. 1-2,,15-18, 22-24. *See also* Ex. 159, p. 52, ll. 3-20.

**2. <u>HISD Gave Preferential Treatment to Marshall's Clients FBM and RHJ During the Bid Review Process</u>**

After the deadline to submit a response to the Request for Proposal, HISD Employee and JOC Selection Committee Member Elvis Eaglin sent two e-mails, each one minute apart, on June 5, 2008, to RHJ and FBM advising them to lower their pricing co-efficient. Ex. 51 and 52. In other words, HISD's staff gave a special opportunity to only two of the 11 bidders, essentially letting them lower their prices after the bids were in. Specifically, Eaglin told Jackson in the e-mail:

> A review of your pricing coefficients indicates that several of your components may be outside of the industry's norms. I am particular concern about your "all cost coefficient" at 23% and your "overhead coefficient" at 33%. Please review your coefficients and let me know if you wish to adjust any of the individual coefficients, (All Costs, Profit,

> Performance and Payment Bonds, or Overhead), before I start the evaluation process. I can be reached at 713-556-6526.

Ex. 51

> Similarly he told FBM in the email:
>
> Mr. Thomas there is something I need you to take a look at. A review of your pricing coefficients indicated that one of your components may be outside of the industry's norms. I am particular concern about your "overhead coefficient" at 0%. Please review your coefficients and let me know if you wish to adjust any of the individual coefficients, (All Costs, Profit, Performance and Payment Bonds, or Overhead), before I start the evaluation process. The overhead coefficient is very important when pricing non-Means listed work. I can be reached at 713-556-6526.

*Id.*

Other contractors who had a higher pricing co-efficient did not receive the same e-mail. Eaglin testified in his deposition:

> Q. And I apologize if I did, but on June 6 or June 5th, 2008, did you send the other vendors who had applied for the 2008 RFP an e-email like this?
> A. No.
> Q. Why not?
> A. These were the two that stuck out as having irregularities.
> Q. Anything else?
> A. No.
> Q. When had the time period to submit an RFP closed for that 2008 RFP?
> A. It closed – 2008 was in – it closed in April, I think.
> Q. And so this was sent after the time period that the RFP submission dated had closed?
> A. Yes.
> Q. Okay. And the initial evaluation – committee evaluation in 2008 had – when they came to their results at the end, in perhaps August of 2008, had ranked Fort Bend Mechanical and RHJ in the top five; is that correct?
> A. Yes.

Ex. 160, p. 49, ll. 7-25, p. 50, ll. 1-2. [3]

The pricing coefficient was 55 percent of the scoring by the selection committee. Ex. 41, p. 4. Eaglin claimed in his Declaration that "[A]llowing the vendors to reapportion or correct technical errors with their coefficient components did not assist the vendors in achieving a superior bid score, as their overall coefficients were the basis of their scores." Ex. 112, p. 8. However, the e-mails sent on June 5 to RHJ and FBM do not ask them to correct a clerical error. The e-mails invited RHJ and FBM to "adjust" their coefficients. Ex. 51 and 52. The individual coefficient amounts were then added together to determine the coefficient for standard hour pricing and non-standard hour pricing. Ex. 41, p. 9. Then the standard hour pricing coefficient and non-standard hour pricing coefficient were combined to determine the overall coefficient. Ex. 41, p. 5. Thus, the individual coefficient components did, in fact, determine the overall coefficient which accounts for 55 percent of the applicant's score.

Although the selection committee gave RHJ a high ranking based on its revised coefficient score, RHJ was disqualified from consideration because of a pending lawsuit with Fort Bend Independent School District. Ex. 161, p. 50, ll. 1-4, ll. 22-25, p. 49, ll. 1-12. (In that lawsuit, Jackson claimed the company was slandered when the Fort Bend ISD board publicly stated the company was substantially over budget and over time on its

[3] Eaglin contradicts his deposition testimony on this issue in an earlier-filed declaration. Eaglin states in his Declaration attached to HISD's Motion for Summary Judgment that he did alert one other JOC applicant to a clerical error in which they placed a 1 in front of the decimal point on all of its coefficients when in fact the 1 belonged only in front of one of the coefficients. There is still no explanation as to why GRG and the others did not receive this special treatment. If this declaration stands for anything, though, there is a fact issue on this point.

work with the district, and therefore its contract would not be renewed. Ex. 162, p. 207, l. 25, p. 208, ll. 1-25, p. 209, ll. 1-5.)

The oral presentations were held on August 22, 2008. Ex. 41. Jackson lied about not being in a lawsuit with Fort Bend ISD. Ex. 161, p. 50, ll. 1-25, p. 51, ll. 1-12. A few months earlier on May 7, 2008, Eva Jackson sat for a lengthy oral deposition in her lawsuit against Fort Bend ISD. Ex. 162. In the Fort Bend ISD deposition, Jackson testified in response to questions from attorney Rick Morris, now counsel for Larry Marshall:

> Q. Do you understand that I'm here today to ask you questions about what you know that supports your allegations in this lawsuit?
> A. I understand that.

*Id.*, p. 6, ll. 7-10.

> Q. Yes, ma'am. Since you filed your lawsuit against Fort Bend Independent School District, have you had any discussions with Ms. Walker about the dispute regarding the price coefficient?
> A. To the best of my knowledge no.

*Id.*, p. 44, ll. 7-12.

> Q. And, again, you testified earlier that you reviewed this original petition and you authorized its filing. Correct?
> A. That's correct.

*Id.*, p. 188, ll. 1-4.

Thus, Eva Jackson was not telling the truth when she represented she was in a mediation and not a lawsuit.

On November 12, 2008, HISD announced the new JOC contractors. Ex. 17. They were Gil Ramirez Group, LLC; Horizon International; Fort Bend Mechanical

("FBM"); KBR; and Reytec/CBIC. Ex. 17. These contractors joined Jamail & Smith, which was still under a six year, annually renewed contract. Ex. 63. Gil Ramirez Group and Reytec/CBIC are Hispanic minority-owned businesses, and Horizon International is an Asian-owned minority business. KBR is a large international corporation incorporated in Delaware. Jamail & Smith is a large Texas construction company that works in Texas and on out-of-state projects.

### 3. RHJ Fired Marshall and Clay As Soon As It Learned RHJ Was Not Awarded an HISD JOC Contract

Eva Jackson did not turn to Clay for moral support or problem-solving techniques in response to losing the contract. Ex. 156, p. 53, ll. 9-11. Rather, seven days after learning RHJ was not awarded an HISD JOC contract, RHJ terminated its consulting agreement with Clay. Ex. 18. The termination letter stated RHJ could no longer employ Clay due, in part, to "a lack of new business development". Id.

## January 2009

### 4. Marshall Pressured Superintendent Saavedra to Resign After Not Adding RHJ to the JOC Program

Marshall was elected president of the Board again in January 2009. Ex. 153, p. 170, ll. 12-24. Marshall expected Dr. Saavedra to add RHJ as a JOC contractor. Ex. 158, p. 41, ll. 1-16. Dr. Saavedra testified in his deposition about Marshall pressuring Lindsay, Chief of Business Operation, to add RHJ as a JOC contractor. Lindsay reported his concerns to Dr. Saavedra regarding the pressure from Marshall.

Q. And so who is Mr. Lindsay in terms of this process at HISD?
A. Dick Lindsay was – I don't remember his exact title, but basically he was in charge of our facilities and maintenance department and was the head person.

*Id.*, p. 39, ll. 20-24.

Q. You testified earlier about your belief based on Dick Lindsay's statements that Mr. Marshall was putting pressure on him with regard to a vendor.
A. Right.
Q. What did Mr. Lindsay say? How did he describe that pressure?
A. He – the way he would describe it to me would be that, you know, he says, well – he says, Mr. Marshall really wants us to move this forward or, you know, he keeps – he keeps pushing – pushing me, specifically him, Lindsay – Lindsay would say he keeps pushing me to have Ms. – I can't remember – Ms. Jackson's company brought forward. Those are the basic – the basic comments that – that I would get from Lindsay.

*Id.*, p. 120, ll. 1. 11-25, p. 121, ll. 1-9.[4]

Q. Other than Mr. Lindsay, have you had any contact with any other HISD staff who communicated to you I feel pressure from Mr. Marshall or I heard from Mr. Marshall about this vendor or how do you want me to handle Mr. Marshall on this vendor, something of that nature?
A. I think – I think – I think Mr. Lindsay, myself and I think Melinda Garrett might have had some conversations at times as it – as it pertained – and the reason Melinda's involved mainly because procurement comes under her in reference to the Eva Jackson

[4] The statements from Lindsay and Garrett to Dr. Saavedra are not precluded by the Hearsay Rule. First, the statements go to show the intent and motive behind HISD's JOC decisions, including the initial exclusion of RHJ. *Prather v. Prather*, 650 F.2d 88 (5th Cir. 1981). Also, a statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. *Id.* Under Rule 801(d)(2)(E), the proponent of admittance must prove by a preponderance of the evidence (1) the existence of the conspiracy, (2) the statement was made by a co-conspirator of the party, (3) the statement was made during the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy." *United States v. Cornett*, 195 F.3d 776, 782 (5th Cir.1999). Marshall has objected on numerous occasions to the admission of evidence in the record, invoking the rule against hearsay. However, the foregoing exceptions apply to those objections as well. Plaintiffs can demonstrate that each statement objected to either is not hearsay or the statement falls into one or more exceptions. Indeed, a review of Fifth Circuit case law demonstrates that in one bribery case after another the type of evidence offered by Plaintiffs here is exactly the type allowed to secure bribery and RICO convictions.

contract, and I think she had applied for – I believe at the time those discussions occurred was she had submitted a proposal to be a – a job order contractors.

Q. And what was the subject matter of the discussion?

A. The discussion was that – that Mr. Lindsay talking a little bit about – you know, getting a little bit of pressure from Mr. Marshall concerning Ms. Jackson, Ms. Garrett – Melinda Garrett saying, you know, Ms. Jackson's company involved in a lawsuit with Fort bend, and, basically, that was the rationale we used at the time not to extend the contract to her at the time.

Q. When you say rationale, does that mean there were other bases for not extending the contract to RHJ?

A. You know, honestly, I never had a comfort level with Ms. Jackson, especially after the luncheon with my wife and those comments made. I just never had – you know, never had a comfort level, and it was probably a individual that I did not think was good for the – for the district to do business with.

*Id.*, p. 44, ll. 15-25, p. 45, ll. 1-21.

Marshall also enlisted the help of Trustee Diana Davila, wife of Houston Community College Trustee Abe Davila, to pressure Dr. Saavedra to allow RHJ to be a JOC contractor. *Id.*, p. 27, ll. 14-25, p. 28, ll. 1.

In addition, Jackson had previously repeatedly asked Dr. Saavedra's wife for a lunch date in an effort to influence the district.

Q. Did you ever deal with Richard or Eva Jackson?

A. Eva Jackson, yes.

Q. And how was that?

A. She asked me out for lunch.

Ex. 163, p. 111, ll. 22-25, p. 12, l. 1.

Although M. Saavedra could not recall the date of the lunch, she stated it was a long time after the 2004 Christmas party. *Id.*, p. 13, ll. 7-10. At the lunch, Jackson offered to pay money to Dr. Saavedra.

Q. Was there any discussion about, you know, your husband or HISD business or anything of that sort?
A. Well, she did – she told me that – she said, "I want to give your husband some money."

*Id.*, p. 14, ll. 5-8.

Q. And how did you respond to that?
A. I said, For what?" And she said, I just want to give him some money." And I said, "He's not going to take any money from you." And she said, "Well, I want to help out the school district."
Q. And did you give her some ideas on how she might do that?
A. Yeah, I said, "Why don't you volunteer at the elementary schools to read to the kids or tutor in the after-school program."
Q. Okay. And what was Mrs. Jackson's response to that?
A. She said, "I would rather just give him some money".

*Id.*, p. 14, ll. 13-25, p. 15, l. 1.

Q. Okay. Just, "I want to give money to your husband?"
A. Yeah.

*Id.*, p. 16, ll. 22-24.

Dr. Saavedra had refused to give into the pressure to allow RHJ to receive a JOC contract in November 2008. *Id.*, p. 46, ll. 15-18. In response, Marshall advised Dr. Saavedra he had lost confidence in him as a superintendent. *Id.*, p. 70, ll. 7-11. The loss of Marshall's support resulted in Dr. Saavedra advising the board of his intent to resign. *Id.*, p. 69, ll. 18-25, p. 70, ll. 1-6. Dr. Saavedra believed he lost Marshall's support as a result of not allowing RHJ to be a JOC contractor. *Id.*, p. 70, ll. 7-11. The board members who "lost confidence" in Dr. Saavedera are the same ones implicated by the evidence in this case. *Id.*, pp. 132-34. Dr. Saavedra had received nothing but good evaluations. *Id.*, p. 131, ll. 8-9. Dr. Saavedra testified:

Q. Is it then fair to say that you leaving the district did – when you did had nothing to do with Mr. Marshall or pressure or dissatisfaction or bad work environment?

A. Well, I think it became a bad work environment January of '09 as soon as Mr. Marshall became president, you know. It was clear I was being treated differently, and, I mean, even to the point in January as they reorganized – he became president the very first meeting in January where he moved my sitting location at the board table from being next to the board president like I had been all 4 ½ years prior, and I believe there were superintendents prior to me, and basically moved me to the end of the table, and I stayed there until I left in August – of August and that immediately changed soon after the new – the new superintendent was hired. So, you know, it was behaviors like that that became obvious that I simply needed to move on. Things were not – were not pleasant.

**February 2009**

On February 4, 2009, Dr. Saavedra announced his intention to resign. *Id.* p. 69, ll. 5-13. Dr. Saavedra left on August 31, 2009. *Id.*, p. 73, ll. 4-7. That same month, RHJ was added as a JOC contractor due to constant pressure from Marshall. *Id.*, p. 169, p. 31, ll. 1-23.

**5. Medford and Marshall go to the Super Bowl**

The Super Bowl was held February 1, 2009. Ex. 81. Marshall explained he was merely attending the Super Bowl game in place of Medford's original guest, Joyce Moss Clay. Ex. 153, p. 190, ll. 16-23. Marshall denied any business relations regarding Clay were discussed during the weekend. Ex. 154, p. 316, ll. 12-15.

**6. FBM Hired Clay as Consultant Starting on Super Bowl Sunday**

However, on February 4, three days after the Super Bowl, the records show the first mention by Sharon Medford (president of FBM and wife of David "Pete" Medford)

to the company bookkeeper regarding Clay's employment. Ex. 2. The contract for services between FBM and Clay was dated January 30 with an effective date of February 1, the same day as the Super Bowl. Ex. 87. Clay signed the contract on February 4. Ex. 87. Clay paid 65 percent of her fees collected from FBM to Marshall. Ex. 8, 65, 157, p. 56, ll. 10-15.

Medford claimed Clay was hired to assist FBM in its effort to make charitable contributions to HISD schools. Ex. 159, p. 48, ll. 13-25. If this were true, Clay was paid $36,000 a year to facilitate FBM making less than $10,000 a year in donations to HISD schools. Ex. 87 157, p. 39, ll. 6-13.

Sharon Medford was asked in her deposition why it was necessary to employ Clay for $36,000 a year to deliver donation checks to schools rather than handle the donation delivery herself. Mrs. Medford did not know why it was necessary to hire Clay to make those donations. Ex. 165, p. 30, ll. 18-25, p. 31, ll. 1-7.

Clay testified in her deposition she did not know how many hours in a month or year she worked for FBM. *Id.* p. 39, l. 25, p. 40, 11. 1-4. She did not have any detailed timesheets or any timesheets at all of her time spent working for FBM. *Id.*, p. 40, ll. 5-9. Clay described her invoices as containing arbitrary descriptions of her services which did not really mean anything. *Id.*, p. 35, ll. 9-25, p. 36, ll 1-25, p. 37, ll. 1-25, p. 38. ll. 1-25, p. 39, ll. 1-5. There was no e-mail correspondence or regularly set meetings, yet Clay's invoices to FBM request payment one month in advance for her work. Ex. 5. The invoices Clay mailed were the same every month and never contained any detail

regarding her alleged services or time. Ex. 4 and Ex 165, p. 35, ll. 9-25, p. 36, ll 1-25, p. 37, ll. 1-25, p. 38. Ll. 1-25, p. 39, ll. 1-5. Despite the lack of information about the services rendered, FBM, like RHJ, mailed a check to Clay every month for payment. Ex. 1, 3 and 4.

**7. <u>FBM Employed Marshall's Grandson and an HCC Trustee's Company</u>**

FBM employed Marshall's grandson, according to a statement he made to the *Houston Chronicle* reporter Erika Mellon published by the *Chronicle* on April 14, 2012. Ex. 128. However, Medford denied doing any favors for trustees in his deposition. Ex. 159, p. 52, ll. 15-20. Further, FBM contracted with companies owned by Houston Community College Trustees or their family members. Ex. 29, 30, 34 and 35. Specifically, FBM contracted with HCC Trustee Chris Oliver and companies owned by a close friend of HCC Trustee Abe Davila and a family member of HCC Trustee Yolanda Navarro Flores. *Id.* HCC Trustee Oliver and FBM conveniently forgot to disclose their relationship in the Conflict of Interest forms filed with the Houston Community College until an employee with HCC discovered the relationship. *Id.* Likewise, FBM failed to complete its Conflict of Interest Form, partially in 2008, and completely in 2010 for the HISD JOC RFP. Ex. 129, 130 and Ex. 160, p. 42, ll. 9-25, p. 43, ll. 1-14. In other words, HISD hired FBM under a JOC contract even though FBM left blank material portions of the bid form that, if filled in correctly, would have disclosed FBM's monthly cash payments to Marshall and the other bribes it paid. HISD just turned a blind eye, or,

more likely, HISD staff working the bids knew about the activities and knowingly ignored the form.

**8. Medford Expressly Denies in Deposition ever Enriching Marshall**

In his deposition, Medford denied giving Marshall anything of value:

Q. Okay. Now, I want to distinguish now from a campaign contribution, having talked about those, have you made a transfer of money, goods, or anything of value to an HISD trustee?
A. Just through campaign contributions.
Q. In your opinion, the only transfers of money, goods or anything of value to trustees that you have transferred were campaign contributions?
A. That had a monetary value?
Q. Yes.
A. That's pretty much it. Anything that has a monetary value, yes.
Q. Have you done any favors for any trustees?
A. Can you define a "favor"?
Q. A trustee asks you to deliver some service for them, or make a phone call, or introduce them to somebody, or open a door for them.
A. No.

Ex. 159, p. 52, ll. 3-20.

**Spring 2009**

**9. Federal Funds Were Used to Pay for JOC Projects**

In September 2008, Hurricane Ike caused serious damage to schools and buildings owned by the school district. Ex. 163, p. 23, ll. 11-14. HISD applied for and received much needed FEMA funds. Id., p. 23, ll. 2-25, p. 24, ll. 1-5. Also, the JOC contractors managed the E-Rate vendors and installed computer cables for the federal E-Rate program. Ex. 47 and 203. The JOC Contractor Program was overwhelmed with life and

safety repairs in early 2009 according to e-mail correspondence to and from Richard Lindsay, Chief of Business Operation and Head of the JOC program for HISD in early 2009. Ex. 43, 123 and 125.

**Summer of 2009**

**10. GRG Goes Above and Beyond as New JOC Contractor Despite HISD's Disorganized Start**

The start of the new JOC program was disorganized. Ex. 47 and 125. The school district was unable to start assigning projects for at least six months on many schools which required immediate repair of life and safety issues. Ex. 47, 123, 125.

Initially, all of the JOCs had different pricing coefficients and some of the JOCs such as GRG and Horizon International were required to bid against one another to win a certain project – a procedure HISD's own official testified was inappropriate. Ex. 47 and Ex. 167, p. 68, 11-25, p. 69, ll. 11-17. After the bidding process was over, according to industry practice, each JOC contractor should have been asked to adjust to the same coefficient as the other contractors. Ex. 167, p. 71, ll. 16-25, p. 72, ll. 113. In response to the disorganization, delays and inefficiencies in the start-up of the expanded JOC program, Horizon International and GRG started an effort to streamline the JOC program at HISD by submitting a lengthy written report of proposals to Willie Burroughs, one of the HISD administrators in charge of the program. Ex. 64.[5] One of the primary

[5] Many of these proposals would have had the effect of reducing the profits earned by FBM and RHJ. In fact, both of these contractors have a history of overcharging for their services. GRG, new to HISD, was providing a low bid for every contract. Ex. 47 & 50. This fact alone must have served as a powerful motivation to get GRG out of the

proposals was for all JOCs agree to a uniform coefficient and not waste time bidding against one another on the same project. *Id.* Willie Burroughs expressed much appreciation for the feedback on the JOC program and started implementing the suggestions. *Id.* By October 2009, it appeared all the JOCs agreed to use the same coefficient. Ex. 39 and 40.

Meanwhile, GRG finally started receiving projects in June and July 2009. Ex. 47. GRG won the majority of projects after receiving the winning bid. Ex. 47. The CMPA (project manager for the JOC program), who for a short time oversaw the project awards for the JOC contractors, determined GRG's estimates provided the best value to the district. Ex. 47[6] and Ex. 168, p. 17, ll. 21-25, p. 18, ll. 1-18. Based on this determination, GRG won most of the projects on which it submitted a scope of work and estimates. Ex. 47 & 50. GRG was receiving more than a million dollars in projects monthly. *Id*. GRG received routine praise for the quality and timeliness of its work. Ex. 47.

**11. <u>HISD Board Approves RHJ as JOC Contractor</u>**

**August 2009**

JOC program. GRG was not on the "inside of any circle." Ex. 164, p. 84. GRG was therefore not engaged in the price fixing undertaken by the other JOCs.

[6] Having a CMPA supervise the JOC contractors itself raises questions. It is not normal for CMPAs to be used on JOC contracts. In this case, it appears to have occurred in order to grant favors, and waste tax dollars, to board member patrons. Ex. 164, pp. 55-56. For example, Johnston, LLC is close with Marshall. Ex. 164 p. 33.

After RHJ resolved the lawsuit with FBISD, Marshall arranged for RHJ to meet with Lindsay in order to be added as a JOC contractor although the selection process for the 2008 JOC program was closed in November 2008. *Id.*, p. 58, ll. 3-21.

The administration submitted an agenda item at the August 2009 board meeting recommending RHJ as a JOC contractor. Ex. 19. The board approved it. *Id.* Dr. Saavedra testified that as he was headed out the door, he reluctantly recommended to the Board to add RHJ as a JOC due to pressure from Marshall. Ex. 158, p. 75-76. RHJ's contract commenced in September 2009 and was up for renewal three months later in December 2009. Ex. 49.

Stephen Pottinger, former Head of Procurement, stated in his deposition that he recalled when a JOC supplier was substituted in for a different JOC supplier by Melinda Garret at the request of Marshall:

> Q. Did you ever see board members tell Ms. Garrett to use a particular vendor, or hear?
> A. Did I personally hear it?
> Q. Yes.
> A. No.
> Q. Did you hear it secondhand from anyone?
> A. Yes.
> Q. From who?
> A. In the case of when I asked Dick Lindsay why he substituted that supplier on the JOC contract –
> Q. Uh-huh.
> A. – he said that that came from the board. And I said, "What do you mean it came from the board?" He said, "Mr. Marshall."

Ex. 169, p. 31, ll. 10-23.[7] Although Pottinger could not recall more specifics, there is a reasonable inference that the substitution about which he recalls refers to replacing GRG with RHJ. This is because Jamail and Smith was the sole JOC contractor prior to December 2008. Ex. 17. Lindsay left HISD in February 2010. Thus, the time period in question had to be sometime between December 2008 and February 2010. This is the same time period, August to December 2009 that RHJ was given a contract as a JOC contractor and GRG started losing JOC work. Ex.19. Not long after in March 2010, HISD auditor John Gerwin, stated in an email "…the Bond office should be instructing the replacement JOC contractor to do their own scope and proposal" in the same email addressing whether HISD owes GRG money for costs incurred in preparing proposals for JOC work it did not receive. Ex. 74.

In contrast to RHJ's special treatment, another construction contractor, Heery International, was disqualified for consideration for general construction jobs in 2008 due to a lawsuit with DeKalb Independent School District. Ex. 153, p. 61, ll. 20-25, p. 62, ll. 1-7. Heery International was informed it was disqualified because it was in a lawsuit with DeKalb schools. Ex. 168, p. 102, ll. 10-21. Heery International was permanently disqualified from the RFP, not just put on hold as was RHJ's status due to its lawsuit. *Id.*, p. 103, ll. 11-14 and 153, p. 61, ll. 2-25, p. 62, ll. 1-7. In addition, Melinda Garrett, CFO of HISD, testified RHJ was put on hold in order to research the underlying reasons for

[7] Dick Lindsay's statement to Pottinger is not hearsay because it is a statement by a then opposing party (FED. R. OF EV. 801(d)(2)). Even if it is hearsay, it falls squarely within an exception to the Hearsay Rule because the statement goes to show intent or motive. *See* FED. R. OF EV. 803(3).

RHJ's lawsuit with Fort Bend ISD, but Heery International was simply disqualified without any knowledge of an investigation into the basis of Heery International's lawsuit with DeKalb schools. Ex. 166, p. 16, ll. 9-25, p. 17, ll. 1-10. Further, unlike Heery International's disclosure of its lawsuit in its RFP Proposal as required under the RFP, RHJ failed to disclose its lawsuit with Fort Bend ISD. Ex. 161, p. 50, ll. 1-25, p. 51, ll. 1-12.

### 12. GRG Lost Projects Immediately After RHJ Was Added, and Ramirez Is Told He Should Pay Bribes to Recover His Work

**September 2009**

Shortly after RHJ was added as a JOC contractor, GRG stopped receiving calls about new projects. Ex. 47. GRG made several inquiries about the decrease in projects, but no one was able to provide an explanation. Ex. 47.

In this same timeframe, Gil Ramirez, Jr. attended a lunch with Ricardo Aguirre, a consultant to ABM Janitorial, a nationwide janitorial company incorporated in Delaware. Ex. 47, 141 and Ex. 170, p. 19, ll. 14-17. Aguirre owned a company called Accel Building Maintenance. *Id.* , p. 18, ll. 21-25, p. 19, ll. 1-1. Aguirre has known Gil Ramirez, Jr.'s father for many years. *Id.*, p. 37, ll. 9-11. Aguirre also knows Marshall. Ex. 153, p. 73, ll. 25, p. 74, ll. 8.

Marshall and Aguirre had regular meetings according to Marshall's personal calendar. The meeting notes start in July 2008 and continue through March 2010. Ex. 133, 134, 135, 136, 137, 138 and 139. In 2007, Marshall's calendar notes a meeting with "ABM/Holler" for February 9, 2007. Tom Haller signed the consulting contract between

Accel Building Maintenance and ABM Janitorial. Ex 141. One of the calendar entries states "Contract / JMC/Accell" for August 10, 2008. Ex. 134. The name Accel is also noted on Clay's spreadsheet of customers. Ex. 8. Clay gave Marshall 75 percent of her collection from Accel. Ex. 8.

Two of the meetings between Marshall and Aguirre were held August 7, 2009, and September 25, 2009. During this same time period, Aguirre told Gil Ramirez, Jr. he should pay money to Marshall through Clay for the purpose of Marshall protecting GRG's JOC contract. Ex. 47, 137 and 138. Aguirre explained to Gil Ramirez, Jr. that if GRG wants to keep its contract with HISD, GRG needs to hire Clay as a consultant for approximately $2500 to $3000 per month, and she in turn will pay Marshall. Ex. 47. Aguirre explained to Gil Ramirez that Clay will not actually perform services for the money she is paid. Ex. 47. She is simply "the bag lady". Ex. 47. Marshall will then use his influence as a long-time board member to obtain or protect the contract. Ex. 47.

Aguirre further explained he used money received from ABM Janitorial to pay for Marshall's influence to protect ABM Janitorial. Ex. 8 and 47. Documents obtained from ABM Janitorial regarding payments to Accel Building Maintenance show Aguirre was paid between $4000 to $13,000 a month for the nearly identical three monthly meetings. Ex. 142 and 143. The meetings are often with board members of HISD and HCC. *Id.* In February 2009, HISD awarded a large contract to ABM Janitorial. Ex. 132.

In Aguirre's deposition, he refused to answer many questions regarding his acts to improperly influence Marshall citing his Fifth Amendment right to not incriminate himself. Ex. 170, pp. 34-35.

Gil Ramirez, Jr. refused to pay Clay or Marshall any money. From September 2009 thereafter, GRG received almost no new projects. Ex. 47. September 2009 is the month RHJ was added as another JOC contractor. Ex. 19. Pottinger and Lindsay referred in e-mails to RHJ as the "replacement contractor." Ex. 169, p. 31, ll. 10-23. Likewise, as noted, an e-mail from Gerwin months later also refers to a replacement JOC contractor using the estimates and scopes of work previously prepared by GRG. Ex. 74. There is a genuine issue of fact as to whether RHJ was intended to replace GRG and received all of GRG's projects because GRG would not make payments to Marshall.

**October 2009**

**13. HISD Administration Recommended Renewing All JOC Contractors for Annual Renewal**

In late 2009, the administration prepared a recommendation to the board to renew all existing JOC contractors' contracts for another year, including GRG. Ex. 39 and 40. HISD Board Member Rodriguez informed GRG its contract would be renewed. Ex, 47. Also, Richard Lindsay informed GRG its contract would be renewed. Ex. 47. As of this time, all of the existing JOC contractors had agreed to use the same pricing co-efficient for their work. Ex. 39 and 40.

**December 2009 / January 2010**

## E. 2008 JOC Contractors Thrown Out So Marshall's Preferred Companies Can Divide Millions of JOC Work Among Themselves

### 1. HISD Board Did Not Renew the JOC Contracts Even Though There Were Millions of Dollars of Life and Safety Projects Still Incomplete

In December 2009, GRG learned from Richard Lindsay its contract was expected to be renewed at the January 2010 board meeting. Ex. 47. The agenda item recommending the renewal was submitted as Agenda Item F-3. Ex. 20. A few days before the meeting, Item F-3 was withdrawn. Ex. 20. There was no public explanation given for why the agenda item was withdrawn. Ex. 47. According to the document production, neither GRG, nor any of the other contractors, ever received a letter from HISD informing the contractor of a problem with performance. Ex. 47. The JOC contract required performance issues to be raised by HISD in a detailed process which never occurred with GRG. Ex. 36 and 47.

Dr. Terry Grier, the superintendent at the time, testified in his deposition that Lindsay was fired from his job by Grier because Lindsay had inadequate reasons justifying the selection of the additional JOCs in 2008 (KBR, GRG, Horizon, FBM, Reytec and RHJ,). Ex. 171, p. 26, ll. 22-25, p. 27, ll. 1-25, p. 28, ll. 1-25, p. 29, l. 1. Grier alleged that Lindsay's only response as to how the 2008 JOC contractors were selected was related to concerns over MWBE participation. *Id.*, p. 30, ll. 5-10, p. 31, ll. 19-25, p. 32, ll. 1. Grier testified that Lindsay's failure to submit a written explanation on the matter was the reason it was removed from the agenda. *Id.*, p. 11-25, 1-9.

However, Lindsay had previously prepared a detailed response to the charge that 2008 JOC selection process was flawed in the fall of 2009. Ex. 126. The written response was known to Gerwin, and presumably Gerwin's boss Bob Moore, because Gerwin wrote a written response back to Lindsay on November 12, 2009. Ex. 67.[8] Lindsay explained in his response that there was a large demand for life and safety repairs and therefore five to six additional JOCs were needed. Ex. 126. Lindsay further explained that the JOC selection resulted in four MWBE firms and two other vendors who had extensive JOC experience. Ex. 126. Lindsay further explained that the five JOC contractors which were not selected out of the original 11 applicants in 2008 were all disqualified for missing paperwork, potential conflicts of interest, insufficient MWBE goals or lack of local office. Ex. 126. Lindsay's response further states each of the existing JOC contractors had agreed to all lower and use the same coefficient. Ex. 126.

**2. <u>Marshall and Grier Used Rigged Audit to Justify Rebid of JOC Program</u>**

HISD relied on an audit report of the 2008 JOC selection process as its explanation for not renewing the JOC contracts in January 2010. Ex. 171, p. 33, ll. 25, p. 34, ll. 1-8. This audit report was done by John Gerwin, an auditor for the construction and bond office for HISD. Ex. 161, p. 5, ll. 9-21, p. 8, ll. 17-18 This is the same John Gerwin who oversaw and advised the 2008 JOC selection committee. Ex. 177, p. 30, ll. 1-3. Gerwin testified in his deposition he believed the administration added GRG, Reytec and Horizon based on his interpretation of the MWBE goals:

[8] There is evidence the auditor, Bob Moore, and Marshall were close. In fact, Marshall would talk to Moore about talking to Saavedra. Ex. 158, p. 82.

Q. Do you know under the MWBE office is Hispanic is considered a protected minority, protected group and therefore, would get a point in their favor for being a minority?
A. I think. I'm pretty sure it is, yes.
Q. Okay. What about the Asian American group?
A. I believe so.
Q. Okay.
A. I think it's something to do with they drew a line on the globe, and everybody that's below that line is protected, and everybody above that line is not. That's what it boils down to.
Q. What do you mean drew a line?
A. That's what I heard. They drew a line, like, around the world from, like, the Mediterranean. That's what I always heard. So Africa was below the line, India, some of the Far East. I don't know. That's what I heard, but that's just – that's the way it was developed. I don't know.
Q. So they picked a latitude on the globe –
A. That's what I heard.

Ex. 161, p. 40, ll. 24-25, p. 41, ll. 1-20.

Despite his not so suppressed outrage over three additional minority-owned businesses being added by the administration to the JOC program in November 2008, Gerwin did not start an audit of the selection process until August 2009, the same time period RHJ was being added as the seventh JOC contractor, and Dr. Saavedra was stepping down to be replaced by Grier. *Id.*, p. 9, ll. 9-21, Ex. 19 and Ex. 171, p. 11, ll. 2-7.

In Gerwin's "audit," according to his report, he performs all of his investigation in one day. *Id,* Ex. 41 and 50. In this one-day review, Gerwin concluded the selection process *he* monitored was fine but the addition of the three minority-owned contractors to the JOC program lacked appropriate documentation. Ex. 41. The audit is marked "preliminary" so that it does not have to be made public. Ex. 152, p. 61, ll. 18-25, p. 62,

ll. 1-17. Robert Moore, Gerwin's supervisor and the inspector general, claimed Gerwin's audit of the 2008 JOC selection process was made final in November 2009 and given a new date. Ex. 177, p. 56, ll. 3-25, p. 57, ll. 1. However, Gerwin reviewed in preparation for and testifies about in his deposition only one report – the one issued in August 2009, which was marked preliminary. Ex. 161, p. 5, ll. 6-25, p. 6, ll. 1-12.

Mack, a 20 year former employee of HISD, testified in his deposition that the preliminary audit game is often played at HISD as a way to use the audit finding to justify politically motivated decisions but avoid having to justify it by keeping the audit private. Ex. 152, p. 61, ll. 3-9, p. 61, ll. 22-25, p. 62, ll. 1-25, p. 63, ll. 1-2, p. 65, ll. 20-25. Mack testified:

> Q. Okay. So if I understand you just told me, is that you believe when John Gerwin does an audit it's because someone politically connected within HISD wants an audit done?
> A. Absolutely.

*Id.*, p. 65, ll. 7-11.

Mack testified he had personal knowledge of Gerwin approving an audit Gerwin knew to contain false statements of fact. *Id.*, p. 60, ll. 2-24. Gerwin's audit was inherently flawed on the JOC program because he audited his own work and is therefore not independent. Ex. 50 and 161, p. 49, ll. 20-25, p. 50, ll. 1-25, p. 51, ll. 1-25, p. 52, ll. 1-25, p. 53, 1-25. Also, HISD's internal audit department, which includes Gerwin and his supervisor Moore, was recently criticized by an outside auditing company. Ex. 187. The outside investigation concluded, in part:

> It is our overall opinion that Internal Audit *does not conform* to the *Standards*. "Does Not Conform" means the assessor has concluded that the internal audit activity is not aware of, is not making good-faith efforts to comply with, or is failing to achieve many/all of the objectives of the *Standards*….An internal audit methodology has not been specifically defined and documented in audit work papers…Audits are executed based upon an approved work program, but are inconsistent in terms of quality and level of documentation supporting conclusions. *Id.*

The outside investigation's findings concerning the work product of the internal audit department are consistent with the findings of Plaintiffs' expert with respect to the specific audit at issue here. Ex. 50. Stephen Pottinger, former head of procurement at HISD, also stated in his affidavit,

> However, in my experience and observations, the employees of the Inspectors General's Office appeared to be often influenced by board members. Specifically, I regularly witnessed John Gerwin in meetings advocating for decisions that reflected the desires of board members. It was my experience that Mr. Gerwin's opinions often reflected Mr. Marshall's opinions. I observed Mr. Gerwin to be outspoken, opinionated and biased, which, in my opinion undermined the purpose of the audit office. In my observation and experience, the Inspectors General's office had no accountability and was very disorganized. Ex. 189

In addition, the preliminary audit results were not given to Moore, the Inspector General, for three months although the audit concluded that there was alleged possible criminal activity. Ex. 177, p. 28, ll. 11-19. Further, Issa Dadoush, Richard Lindsay's replacement in April 2010 who was in charge of the final approval of the JOC contractors, testified in his deposition that at the time of the second JOC award in May of 2010, he had never heard of the audit or even read the audit.

> Q. Is it fair to say when you came into the district that the – an audit report had come out and ruled it an earlier awarding of JOC contracts need to be done, is that how you recall it?

A. What I heard was that the JOC was rebid, yes.
Q. Okay.
A. So I did not see the report.
Q. All right. So to this day have you seen the audit report?
A. No, sir.
Q. Have you seen any of the suggestions or concerns in it?
A. No, sir.

Ex. 167, p. 44, ll. 7-19.

Further, in rebidding the JOC contracts in 2010, there was no change in policy because of the audit report. Ex. 177, p. 61, ll. 15-21. In addition, Moore and Gerwin each claim the 2008 JOC contracts had to be rebid because of inadequate documentation on how the 2008 JOCs were selected. Ex. 161, p. 46, ll. 24-25, p. 17, ll. 1-4 and Ex. 177, p. 60, ll. 24-25, p. 61, ll. 1-14. Moreover, Grier supported the rebid of the JOC contracts based on Lindsay's alleged failure to explain how the 2008 JOC were selected. Ex. 171, p. 28, ll. 9-25, p. 29, l. 1. Grier claimed Lindsay's only explanation was the district wanted to meet MWBE goals. *Id.*. Grier stated he considered it equivalent to no explanation at all. *Id.*

However, Lindsay made a written response explaining how the 2008 JOCs were selected. Ex. 126. Gerwin received Lindsay's response and wrote a report discussing the response dated November 12, 2009. Ex. 67.

The true purpose of the audit was not Gerwin's outrage that three minority-owned businesses were added as JOC contractors in 2008. Likewise, the true purpose of the audit was not an absence of documentation regarding the decision of the 2008 JOC selection. The true purpose of the audit was to justify a rebid of the JOC contracts so

Marshall's preferred contractors, and only those contractors, received JOC contracts. Had GRG paid bribes to Marshall in August 2009 when asked by Aguirre, then GRG would have received contracts.

As of January 15, 2010, after the agenda item to renew the existing JOC contracts was removed for an unexplained reason, HISD had only Jamail & Smith under contract to perform millions of dollars of life and safety repairs that were still needed, according to an e-mail from HISD employee Travis Stanford of the Construction and Facilities Maintenance Department. Ex. 47, 63 and 76. Although Jamail & Smith was the only company actually under contract during this time, Gerwin, misinformed the administration that RHJ was still under contract and should continue receiving projects. Ex. 74. RHJ's contract had terminated in December 2009 along with the other JOC contractors, but RHJ nevertheless continued receiving projects. Ex. 74. In addition, RHJ somehow gained access to estimates and scope of work reports GRG had previously prepared and submitted to HISD for projects that were not awarded to GRG. RHJ then used GRG's work product as its own. Ex. 74.

**Spring 2010**

**3. <u>New JOC Request for Proposal Is Posted in February 2010, and Marshall's Clients Receive Preferential Treatment</u>**

In February 2010, HISD released a new Request for Proposal for Job Order Contracting. Ex. 47. All the contractors submitted responses, including Jamail & Smith and RHJ, although they were considered still under contract with HISD. Ex. 56.

A selection committee was formed. Ex. 160, p. 10, ll. 7-11. The pricing coefficient was once again made the most important selection criteria and given 50 percent of the weight for the scoring process. *Id.*, p. 21, ll. 8-13. This was inconsistent with the administration's previous policy decided six months earlier, requiring all the JOCs to have a uniform pricing coefficient for projects. Ex. 38, 39, 40, 126 and 160, p. 23, ll. 12-25, p. 24, ll. 1-3.

On April 12 and 13, 2010, the selection committee concluded, based solely on rankings determined in 50 percent by pricing coefficients, that Jamail & Smith, KBR, RHJ and FBM should receive new three-year JOC contracts. Ex. 160, p. 21, ll. 2-13, p. 26, ll. 16-20. The fact finder could reasonably conclude that at least RHJ and FBM knew what coefficient to bid by virtue of their "inside track" with HISD. Moreover, two of the four committee members disagreed with the award results but they were ignored. The dissenting members objected that Jamail & Smith had an unacceptable financial review and a very low Minority Women Business Enterprise Score. Ex. 53. Specifically, on April 12 at 5:04 p.m., Eaglin sent an e-mail to the 2010 selection committee advising of his opinion that the top four ranking vendors should be given a JOC contract. Ex. 51. In response, Committee Member Kathi Redricks replied, "It was my understanding that we would get back together as a group to discuss and address questions or concerns." Ex. 51. (Redricks represented the finance department.) Ex. 160, p. 10, ll. 20-21. Committee Member Alexis "Tina" Licata responded, "In regards to M/WBE requirements only, I would have issue moving forward with Jamail & Smith." Ex. 51. (Licata represented the

Minority Women Business Enterprise department.) Redricks then replied back a few minutes later in response to Licata's comment, "I support Alexis comments. As you are aware, J & S financial review was unacceptable and this should not be taken lightly." Eaglin responded 45 minutes later, "I understand, but their overall evaluation placed them in the running." Ex. 51. Thus, Eaglin advised half of the committee members that Jamail & Smith would be selected regardless of the unacceptable financial review and insufficient minority/women participation. Ex. 44. Further, Eaglin did not schedule a subsequent meeting for the committee to meet to discuss the final selection. *Id.*

The scores awarded by the selection committee for subjective criteria were also suspect for a number of reasons. RHJ received high marks for having a good history with HISD. Ex. 56. However, RHJ's past performance could not be properly rated because it had only completed one JOC project for HISD. Ex. 61. In addition, RHJ had concealed an on-going lawsuit in its proposal submitted for the 2008 RFP and was misleading about the lawsuit in its oral presentation. Ex. 161, p. 50, ll. 1-25, p. 51, ll. 1-12, p. 53, ll. 3-17. Also, KBR was given high marks on its past performance rating although it took several extra months of a 12-month contract to negotiate contract provisions with KBR's attorney. Ex. 56 and 66. Further, FBM should have been automatically disqualified from the 2010 RFP for failing to complete its conflict of interest form. Ex. 160, p. 42, ll. 22-25, p. 43, ll. 1-14.

In contrast, the selection committee did not increase the performance scores for GRG or Horizon for the two vendors' past written proposals to Willie Burroughs on

recommended improvements to the JOC program. Ex. 64 and 160, p. 40, ll. 22-25, p. 41, ll. 1. The proposal identified many time and cost savings strategies for the district. Ex. 64. In addition, GRG and Horizon agreed to use a uniform coefficient for pricing. Ex. 64.

In summary, the four vendors selected for the 2010 JOC program received strong overall scores despite serious flaws in their submissions. RHJ should have been disqualified or given a low performance score for lying about a pending lawsuit in 2008 and completing only one previous project. FBM should have been disqualified for failing to complete its conflict of interest form. KBR should have been given a low performance score for its difficulty in agreeing on contract terms. Finally, Jamail & Smith should have been disqualified for an unacceptable financial review and received a low score for insufficient MWBE participation. In contrast, GRG and Horizon should have been given high performance scores for their above and beyond effort to save the school district time and money in its JOC program.

In addition, there was no clear explanation given by HISD as to why the number of contractors were reduced from seven to four when there was still millions of dollars of life and safety repairs needed that would take as many as three years to complete. Ex. 75, 76 and 160, p. 19, ll. 3-18. Moreover, there were millions of dollars a year of bond JOC construction left undone. *Id.* The only justification given for the reduction of JOC contractors from seven to four was that Eaglin personally decided each JOC should be able to earn $2 million each, if the work was evenly divided among the JOC contractors.

Ex. 160, p. 19, ll. 3-18. If true, it is a reasonable factual conclusion that Eaglin made the reduction from seven to four in order to advantage the two contractors (FBM & RHJ) he had given a chance to change their coefficients back in the 2008 process.

On April 26, 2010, at 8:16 a.m., there was a meeting held between HISD employees Elvis Eaglin, Stephen Pottinger and Robert Fazakerly. Ex. 69. By the afternoon of April 26, the four contractors (KBR, Jamail & Smith, FBM and RHJ) which had been internally selected, but not announced publicly or submitted to the board for approval, were asked to agree to a single uniform pricing coefficient. Ex. 68. Within hours, all four companies agreed to use the same pricing coefficient. *Id.* HISD employee, Mark Miranda stated in an e-mail at 4:42 pm on April 26 to Elvis Eaglin, "It sounds like you were able to get them all to agree on a single coefficient? I was suppressed [sic] it was done so fast. What coefficient did they get down to?" *Id.* However, the next day, Elvis Eaglin circulated an e-mail to five other HISD employees attaching summaries of the ranking criteria, still based primarily (50 percent weight) on the differing pricing coefficients, which were no longer relevant. Ex. 70. The e-mail requested that the top four ranked companies be submitted as an agenda item at the May 2010 board meeting for board approval. *Id.* In other words, Eaglin was falsely using the pricing coefficient to justify the preferential selection process.

Clearly, the pricing coefficient was an illusory criteria for evaluating the JOC applicants. The administration had decided six months earlier to require the JOCs to use the same pricing coefficient. There was no need to ask JOC applicants to submit their

own pricing coefficient. The only questions would be whether the JOC applicant would be agreeable to HISD's requested pricing coefficient. However, the 2010 JOC RFP requested a pricing coefficient and used that pricing coefficient to determine the rankings. This resulted in the favored four, FBM, RHJ, KBR and Jamail & Smith, to be ranked higher than the other applicants. Then the favored four were exclusively asked if they would change their coefficient and agree to the same coefficient which HISD was going to require all along. Ex. 68. The other 2010 JOC applicants were not given the same opportunity to change their coefficients, which would have changed the rankings. Eaglin testified as follows:

> Q. Okay. You would agree with me on Page 1 of this e-mail in which this ranking is being sent around to everyone, that you say in the e-mail, sending around this ranking, "The above two attached summaries should provide the information that you need. One is a summary of the ranking, an order of the rankings, and the other shows the four recommended companies and the breakdown of their pricing coefficients. I will ask each vendor for new submission of their pricing coefficients to coincident with the new negotiated rates. Let me know if other information is needed." Okay. So on the sentence, "I will ask each vendors for a new submission of the pricing coefficient to coincide with the new negotiated rates" –
> A. Yes.
> Q. – did you ask anyone other than the favorite four, KBR, Jamail and Smith, RHJ, and Fort Bend Mechanical?
> Mr. Michel: Objection form.
> A. I only asked the four recommended vendors.

Ex. 160, p. 33, ll. 21-25, p. 34, ll. 1-14 and 70.

**May 2010**

**F. FBM and RHJ Get JOC Contracts, RHJ Rehires Clay and FBM Installs new Generator for Clay**

On May 13, 2010, based on the administration's recommendation, the board approved KBR, Jamail & Smith, RHJ and FBM as new contractors. Ex. 21. When the previously selected JOC contractors, Gil Ramirez Group, Horizon International and Reytec/CBIC, inquired as to why they were not reselected and why the number of JOC contractors were reduced from seven to four, HISD new Chief of Business Operation, Issa Dadoush, (replacement for Richard Lindsay who resigned on February 28, 2010) explained the four selected were the top ranked companies based on the selection criteria, which included 50 percent weight on a pricing coefficient. Ex. 47. There was never an explanation offered as to why the number of contractors was reduced from seven to four. Ex. 47. The only explanation supported by the evidence for the reduction for seven to four is that GRG and Horizon's participation in the JOC program was cutting into the profits of FBM and RHJ, and FBM and RHJ had paid good money to board members to change that.

**1. GRG Was the Best Value for the District in 2008**

GRG proved itself to be the best value for the district. GRG won nearly every project for which it submitted a bid because GRG charged less than the other JOCs. Ex. 47 and 50. However, the 2010 selection committee did not mention this fact in its score sheets of GRG. Ex. 58.

**2. Even Dr. Grier Appears to Question 2010 JOC Results at May 2010 Board Meeting**

The suspicious HISD bid process has even been questioned by the new, current Superintendent of HISD, Terry Grier. Grier stated publicly, at a recorded meeting, "I

have seen a procurement department made up of independent folks rate bids from a variety of different companies across the district to do a lot of different work, and then I've seen staff – just for whatever reason – pull names off of a list and put other names back on a list, (with) no rhyme or reason except, quite frankly, influence where influence has no business coming from." Ex. 149. This is a strikingly honest statement and in response, HISD did nothing. Of course, Grier was surely warned shortly thereafter of who "made him" and who could "break him" if he didn't get back on the Board's page when it came to how contracts are awarded. Ex. 164, p. 37.

### 3. FBM Installed a Generator for Free at Clay's House in Same Time Frame the Board Announces FBM as a Contractor in May 2010

On May 5, 2010, a nearly $16,000 generator was delivered to the home of Joyce Moss Clay by FBM. Ex. 27. Two different versions of an invoice from FBM to Clay have been produced by each party. Ex. 200 and 201. The version of the invoice produced by Clay shows FBM did not charge for the installation of the generator. Ex. 201. Clay testified in her deposition she chose to buy a $16,000 generator from FBM despite the fact she is part owner of her son's Houston area heating, air conditioning and ventilation company. Ex. 157, p. 124, ll. 3-15.

In September 2011 during the course of subpoenaing documents, GRG discovered a file labeled "Joyce Home" among the documents made available for inspection by FBM. In the file there were invoices from Reed Crane & Rigging and Crawford Electric to FBM for the installation of a generator at Clay's home. Ex. 27 and 28. There was no invoice from FBM to Clay in the file.

Medford told Dolcefino in their meeting that:

> Medford: I was, because Larry explained his relationship with Mrs. Joyce to me as they had been – No. 1, they were boyfriend and girlfriend but almost got married, and that he was just trying to help her.
> Dolcefino – Right.
> Medford – And so I really thought that, you know, when people were doing things for Mrs. Joyce, it made Larry happy .....

Ex. 164, p. 65, ll. 10-21.

**4. <u>RHJ Rehired Clay Four Days After Learning It Was Selected As a New JOC Contractor in May 2010</u>**

On April 30, 2010, four days after RHJ learned from Eaglin it was one of the four JOC contractors to be awarded a new contract, RHJ re-hired Clay as a consultant for $2000 a month. Ex. 68 and 86.

**5. <u>GRG Was Effectively Run Out of Business Because It Refused to Pay Bribes</u>**

After losing its primary construction contract, Gil Ramirez Group was unable to recover. Ex. 47. It had placed nearly all its efforts and money into succeeding in the HISD JOC contract. Ex. 47. It was represented to GRG that with a signed JOC contract, it would receive an equal share of the JOC work for three years in HISD. Ex. 47. Three years would have been a minimum since earlier HISD JOCs had been retained for much longer. Ex. 63. Also, GRG counted on the HISD JOC contract to gain more business. Ex. 47. As an HISD JOC contractor, contractors are automatically pre-approved to be hired by many smaller school districts in the southeast Texas area. Ex. 47. In addition, due to HISD's size, it is excellent experience to help a contractor to obtain work with other large school districts around the state and nation. Ex. 47.

GRG lost project awards starting in September 2009, failed to have its contract renewed, and was not selected as a JOC contractor in 2009 because it refused to pay bribes to Marshall by hiring Clay for an illusory consultant position. FBM and RHJ both paid the bribes to Marshall, and Marshall used his influence as a long-serving and intimidating board member to manipulate certain employees and ensure that his paying customers received and maintained HISD contracts. A significant portion of Marshall's income during the critical years is from these bribes. Ex. 9-16. (sealed). Also, Marshall's continued efforts to oppose or water-down HISD ethics policies is further evidence of Marshall's intent. Ex. 186. For example, HISD had no "revolving door" policy that prohibits former staffers from taking work with vendors. Ex. 164, p. 70-71.

## G. HISD Participation in These Illegal Acts Causes the District to Cover Up for the Board's Conduct

### 1. HISD Protects and Covers Up for Marshall Despite Clear Evidence of Bribe Taking

HISD has yet to conduct an audit or investigation into Marshall's acts of receiving payment from HISD contractors and using his influence to obtain or renew existing contracts. Patton, the then ethics and compliance officer for HISD and now Head Auditor, stated in his deposition earlier this year:

> Q. Okay. And again, just so the record is clear, your department has taken no action to investigate the allegations made in this lawsuit?
> A. No.
> Q. Okay. Have you undertaken any attempts to learn more about the allegations in this lawsuit?
> A. No.

Ex. 155, p. 86, ll. 23-25, p. 87, 1l. 1-7.

Grier was questioned at his deposition about his inquiry into the facts made the basis of this lawsuit:

> Q. Do you review any of the pleadings, do you regularly review the media reports of the case, review any depositions or documents exchanged?
> A. No.

Ex. 171, p. 21, l. 2-5.

> Q. Have you not actually listened to or read the transcript of the [Medford] recordings?
> A. No sir.

*Id.*, p. 17, ll. 23-25.

The only investigation Grier has requested as a result of the facts discovered in this lawsuit is the claim by Medford that there was unfinished work and a clogged heating and air conditioning filter at Johnson Middle School.

> Q. As a result of, whether it's this lawsuit or things learned over the course of this lawsuit, or the allegations in this lawsuit, have you triggered any activity at HISD?
> A. Yes.
> Q. What was that?
> A. Whe – as I told you, you'd asked me earlier had I seen or read the deposition or whatever, and I said no, but I had seen what was in the news papers. What I read in the paper, some of the allegations that Mr. Medford's made, I asked our staff about those allegations. I asked our Inspector General to look into some of those allegations. Our attorneys have looked into some of these allegations as a result of the lawsuit.
> Q. Anything else?
> A. No, sir.

*Id.*, p. 21, ll. 21-25, p. 22, ll. 1-12.

Q. So is it the case that you made the request to trigger this inquiry at or about the time the public media was reporting Mr. Medford's recordings?
A. Yes, sir.
Q. And then two days later, you received a response, if I understand, is that right?
A. Correct.

*Id.*, p. 22, ll. 25, p. 23, ll. 1-6.

Q. What did Mr. Bobadilla and Mr. Sands report to you?
A. They, basically, were reporting to me about work that had not been finished at Johnson Middle School and an alleged photograph that Mr. Medford supposedly took of a clogged heating and air conditioning filter at the school.
Q. So did the report limit itself solely to the issues at Johnson Middle School?
A. That's basically what I asked them about, yes, sir.
Q. So was there any report or conversation about Mr. Medford's statements regarding exerting influence over HISD board members or officers?
A. No, sir.

*Id.* p. 23, ll. 17-25, p. 24, ll. 1-6.

Of course, one would not suspect that Grier would trigger an investigation given the clear conflict of interest: any unbiased investigation would implicate him since he was at the center of the decision to require a rebid for the JOC contracts.

Grier explained that the reason he has not asked for an investigation into the facts brought to light as a result of this lawsuit is because he expects employees of the district to report themselves.

Q. So is it the case on the allegations involving exerting influence on board members or officers, you haven't triggered any activity in that regard?

A. No, I‘ve not triggered any activity in that regard. We have a standing process in our district that is any board member, anyone tries to influence anyone, they come straight to me with it.
Q. And so you probably just told me this, but to make sure it’s clear , why have you not triggered anything on the allegations of improper influence?
A. Because, as I’ve told you, we have a standing protocol, if anyone tries to influence any staff member, board member or not, they come straight to me with it.

*Id.*, p. 24, ll. 7-19.

Q. Is it written some place.
A. Not to the best of my knowledge, no.

*Id.*, p. 25, ll. 6-7.

One of the other ways HISD would circumvent the state law requirement to competitively bid all expenses except payroll, travel and a few other miscellaneous items, is that the CFO would simply “direct pay” a vendor. Ex. 89. Pottinger, former head of procurement, testified in his deposition:

Q. When you talk about the direct pay process what is that?
A. That’s the – that’s the secret. The expenditures that are made that are neither competitively bid or emergencies or sole sources or payroll. It’s all those other things that I felt were approved because I never saw them.
Q. Uh-huh.
A. And it’s only until after you start to look at the online check register that you realize most of these checks have never — these vendors or expenditures have never gone through procurement and they’re re referred to in the accounting department as direct pays.

Ex. 169, p. 35, ll. 21-25, p. 1-8.

Pottinger also testified Marshall and Garrett, CFO of HISD, conspired to circumvent state law requiring competitive bidding of expenses by making direct pays to vendors.

> Q. Are there other ways in which you would describe Mr. Marshall manipulating the contracting process?
> A. Well, he very frequently would bypass procurement by bringing vendors in to Melinda Garrett direct, saying, I want you to talk to this person. This person is well-respected in this area or that area. I think we should consider them. And that used to go on a lot.
> Q. How did you know that?
> A. I was just going to say when I found out about expenditures made to vendors, but I knew full well they were not part of a competitive bid or they never received a purchase order from my department so where did they come from. And I would ask those questions and remind Ms. Garrett that's against the law. We've got to stop doing that. That cannot continue. But it would continue until the day I left.
> Q. Was there any disagreement with your characterization as whether it was against state law when you would have those discussions with Ms. Garrett?
> A. I think she would get frustrated with my comments because there are some expenditures that need to be made that are exempt for the competitive process…Payroll, for example. But, I mean, I competitively bid utilities and insurance. I mean, everything that I could get my hands on, I attempted to introduce a competition and improve the process of determining suppliers and pricing, but there other deals were still constantly being made.
> Q. In your conversation with – in these discussions with Ms. Garrett did she ever agree with you characterizations?
> A. She agreed that that's got to be our goal, we've got to work towards that… And the controller also agreed, but they still approved expenditures that were apparently teed up by the board.

*Id*, p. 29, ll. 11-25, p. 1-25, p. 31, l. 1.

> Q. Anyone else that you've heard second hand that the board was directing particular vendors to be used?

A. Melinda (Garrett) would smile periodically when I would ask questions. And she would say, "Stop. I'm getting my direction from the board."
Q. And what were the questions you were asking her that caused her to do that?
A. Why this wasn't competitively bid or why are we doing that when we already have a contract in place.

*Id.*, p. 32, ll. 16-24.

HISD was aware of the 2009 spreadsheet showing the payment of 65 to 75 percent of fees collected by Clay from HISD contractors—Scott Blankenship, Accel Building Maintenance, Linebarger, AO Phillips, Karun Sreema and Fort Bend Mechanical—to Marshall. Ex. 8. HISD has several years of Clay's bank account records, which shows deposit slips identifying HISD contractors and immediate payment to Marshall with the account code for the HISD contractors listed in the memo section of the checks to Marshall. Ex. 65. HISD was aware of the sham services Clay provided in return for thousands of dollars a month in payments from vendors. Ex. 157. HISD knew, at least since 2011, that Marshall engineered Saavedra's resignation because Saavedra blocked RHJ from receiving a contract, but yet HISD continues to spend more than a million dollars in legal fees defending Marshall. Ex. 158, p. 10, ll. 21-25, p. 11, ll. 3 and Ex. 188.

HISD has known for years of Marshall's improper relationships. First, there was the Community Education Partners affair that caused the district to change ethics policies. Ex. 153, p. 96, ll. 9-25, p. 10, ll. 1-11 and Ex. 186. Then, HISD paid a substantial six figure settlement to Frank Watson. Ex. 151, p. 30, ll. 22-25. Perhaps most importantly, HISD board members and staff have known for years about Marshall's

relationship with vendors. In the Rule 30(b)(6) deposition under topic 24 that was the subject of the Court's recent hearings, much was learned concerning HISD's knowledge of Marshall's inappropriate activities. Ex. 179.

## H. Plaintiffs' Expert Witnesses Confirm Illegal Activities, RICO and Calculation of Damages

### 1. Plaintiffs' Hired a Long-time RICO Investigating Officer Who Confirms the RICO Activities

Kenneth J. Wilson was a law enforcement officer in the State of Washington for more than 38 years. Ex. 204, p. 1. He has been a certified fraud examiner since December 1996 and a licensed private investigator since April 2001. *Id.* Wilson worked for The Washington State Liquor Control Board, The Washington State Office at the Attorney General and The Washington State Commission on Judicial Conduct. *Id.* While at The Washington State Office of the Attorney General, Wilson was the coordinator of criminal profiteering investigations, also known as the RICO division. Wilson also performed RICO investigations on behalf of The Commission on Judicial Conduct. *Id.* p. 2. Although most of Wilson's investigations were under Washington state RICO statutes, those statutes are virtually identical to the federal RICO and money laundering statutes. *Id.* Wilson routinely participated and coordinated investigations involving the FBI, IRS and U.S. Customs. *Id.* He also worked closely with RICO investigators and attorney general offices in other states. Wilson has performed RICO investigation trainings around the country and has attended national RICO conferences for federal and state law enforcement. *Id.* While working for The Washington State Liquor Control

Board, Wilson was responsible for investigating organized crime, and in fact, was the state coordinator of such investigations. *Id.* Wilson has testified in RICO prosecutions resulting in conviction and forfeiture. *Id.* p. 2-3.

Wilson reviewed the deposition testimony available at that time as well as the numerous financial and accounting records. *Id.* p. 4-5. Wilson outlines the basis for his opinions over his 23-page report and declaration, all of which is a worthwhile read that reviews the significant evidence amassed in this case. Wilson provides detailed support in his declaration for the facts he relies upon in reaching his conclusions. Only some of his findings and conclusions are highlighted here.

Wilson's report is incorporated herein in its entirety. Nevertheless, some of his specific findings are worthy of mention. For example, Wilson confirms the conduct of Medford, FBM, Jackson, and RHJ was activity that affects interstate or foreign commerce and amounts to racketeering. *Id.* p. 13. Wilson concludes these activities included acts of bribery chargeable under Texas Penal Code § 36.02. *Id.* Wilson concludes these acts amount to money laundering under Texas Penal Code § 34.02. Wilson further concludes these acts are indictable under 18 USC § 201, Bribery of a Public Official. Wilson also concludes these acts are indictable under 18 USC § 1343, Use of Wire, Radio or Television in Connection with a Scheme to Defraud. Wilson confirms these acts are indictable under 18 USC § 1952, Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprise. Wilson confirms these acts are indictable under 18 USC § 1956, concerning money laundering. Wilson confirms these

acts are in violation of 18 USC § 1957, Engaging in a Transaction of Criminally Derived Property in a Value Granter Than $10,000.00.

Wilson also concludes, based upon his extensive training education and experience in RICO, that Medford, RHJ, Jackson, Clay and Marshall (for himself and HISD) conspired to violate 18 USC § 1962(c) (RICO). *Id.* p. 14. Wilson concludes each of those persons formed an enterprise as defined in 18 USC § 1961(3). Like a government investigator in a federal criminal trial, Wilson describes for pages and pages the various facts and evidence that support his professional conclusion in this regard.

Furthermore, Wilson confirms each of the Defendants are persons under the RICO Act. Wilson confirms the activities involved in this case affected interstate commerce in part because out-of-state corporations competed for the contracts, which were illegally awarded to FBM and RHJ, and also because GRG intended to pursue out-of-state JOC contracts based on its experience with HISD. *Id.* p. 22. Wilson also concludes the meetings, breakfast and luncheons between one or more of the Defendants and/or their agents with Marshall recorded on Marshall's calendar, due to the participants, timing and numerosity, raise a reasonable inference of the intent to bribe and/or intentional unlawful conduct. *Id.* p. 23. In short, Wilson's declaration alone creates a genuine issue of material fact on each and every element of Plaintiffs' claims.

**2. Plaintiffs Hired an Experienced Accountant to Investigate, Report on Transactions, Opine on the Gerwin Audit and Calculate Plaintiffs' Damages**

Ransom Cornish became a certified public accountant in 1979. Ex. 50, Ex. A, p. 1. Cornish has a degree in accounting and a doctorate of jurisprudence from the University of Houston. *Id.* He has extensive experience performing audits and preparing damage analysis. *Id.* He has testified in state and federal court as an expert. *Id.*

Cornish reviewed volumes of documentation produced in this case, much of which is listed in his report. *Id*. pp. 2-4. Cornish reached a number of conclusions in light of his review. Regarding the projects GRG received under its JOC contract, Cornish found they had bid on 64. *Id.* p. 4. Of the 64 contracts they bid upon, GRG was awarded 42, for a total contract award amount of $2,063,900.32. Continuing through the remaining portion of 2010, GRG submitted bids on an additional 18 jobs for a total amount of $566,657.00. *Id.* These jobs that GRG was invited to bid upon were never awarded due to the inappropriate conduct made the basis of this case.

GRG had a gross profit percentage of 31.29 percent. *Id.* at p. 5. This profit percentage was consistent with FBM's gross profit percentage. *Id.* In fact, GRG was the successful bidder on the vast majority of projects in which it submitted a bid through the JOC program. *Id.*

Given the competiveness of GRG's bid and its work product, GRG, had it received the 18 contracts it bid upon but were rejected due to improper influence, would have made a gross profit of $177,307.00 in the first year of the contract. *Id.* p. 5. Cornish noted from the document production there was a substantial back log of JOC projects considered life/safety in nature. *Id.* Furthermore, Cornish concluded the fact that

RHJ was added as a JOC contractor outside of the normal process further indicated there was a back log of projects to be performed. *Id.*

Cornish further reviewed the records of HISD as it concerns contracting. *Id.* p. 6. Cornish found it was reasonable GRG would have been renewed for the second and third years of the JOC contract. *Id.* Cornish based his opinion concerning the likelihood of renewals on the fact that Jamail & Smith had consistently been renewed for its contract. *Id.* Furthermore, the contractors awarded JOC status in 2010 have maintained their contracts. *Id.* Cornish estimated, based on the back log of life and safety projects, that GRG would have received in each of the subsequent two years of its JOC contract approximately $4,500,000 in work. With a gross profit percentage 31.29 percent, GRG would have made approximately $1,411,000 in gross profit on awarded contracts for 2010 and then again in 2011. *Id.* p. 8. Cornish then calculated the amount of GRG's damages by determining the general and administrative expenses so as to calculate in that profit. *Id.* pp. 6-9.

Cornish outlines "at least five reasons" for his conclusion that GRG would have continued receiving the same or more work in 2010 and 2011 as it had in the first year of the contract. *Id.* First, Cornish notes that an e-mail by Richard Lindsay, HISD officer, identified "a substantial back log of work" that was used in justifying the letting of the seventh JOC contract to RHJ. *Id.* p. 7. Also, during the time period when GRG was actually awarded JOC jobs, the trend of job awards was increasing, and Cornish has accounted for no such increase in his calculations, thereby making them inherently

reasonable. *Id.* Furthermore, Cornish did not calculate likely JOC work GRG would receive from surrounding school districts as part of the HISD Master JOC Program. *Id.* p. 8. Furthermore, Cornish reviewed the FBM financial records for 2009, 2010 and 2011 and from these, confirms the amount of funds earned by FBM during those three years is consistent with what Cornish finds would have been the income for GRG during that same time period. *Id.* Finally, Cornish relies upon a March 25, 2009, e-mail from Willie Burroughs. It confirms that HISD had $50,000,000 of safety and security funds alone that were to be spent among the JOC contractors, divided evenly. *Id.*

Furthermore, Cornish provided opinions concerning the quality of the John Gerwin audit report employed at the January 11, 2010, audit committee meeting to sabotage GRG's contract renewal. *Id.* p. 8. Cornish concludes, based upon his expert opinion, that, "the report lacks creditability and objectivity to such a degree that it should be disregarded." *Id.* Cornish levels a number of complaints concerning Gerwin's audit report. For example, the report does not include the page concerning "audit scope and audit objectives." *Id.* p. 11. This page is critical because, "not only do they form the frame work for the audit procedures, they provide the basis upon which a user gives significance and creditability to the report." *Id.*

Cornish also concludes the audit, whatever the representation, was not performed in compliance with generally accepted government auditing standards. *Id.* p. 12. First, Gerwin didn't adequately plan and document the planning of work necessary to address the audit objectives. *Id.* The report and audit deviated from generally accepted

government auditing standards in numerous other ways. For example, no document production from HISD was noted. *Id.* p. 13. No methodology was described in the report. *Id.* No documentation or notation was referenced concerning the nature of the selection process. *Id.* p. 14. No documentation was made available to support the actual audit activities other than the "preliminary report." *Id.* p. 14. The mere nature that the report is noted as "preliminary" violates reporting standards of GAS Section 8.32. *Id.*

Cornish concludes "the most significant deficiency in the performance of the audit is the inherit lack of independence of the auditor." *Id.* After citing the particular section of the generally accepted accounting standards, Cornish concludes Gerwin's participation in the original selection process automatically disqualified him from auditing that process. *Id.* pp. 15-17. Cornish catalogs a number of activities Gerwin undertook while servicing on the selection committee, including checking references for individual contractors and exchanging e-mail correspondence with other committee members. *Id.* p. 18. Cornish concludes it's not realistic for Gerwin to represent himself as merely an observer of the selection committee process. *Id.*

Gerwin prepared the report based upon field work and drafting the report itself in *one day*. *Id.* p. 18. Furthermore, the one day Gerwin put to his auditing work, was almost 9 months after the JOC contracts were approved. *Id.* "Since Mr. Gerwin had been involved in the 2008 RFP since the beginning …, he was well aware of the facts and circumstances surrounding the difference between a valuation team recommendations and the selection committee recommendations in November of 2008." *Id.* pp. 18-19.

This delay, other than raising a suspicion that an audit was performed for political purposes, raises questions about the accuracy of the conclusions given the loss of recollections and impact on availability of documents. *Id.* p. 19. Cornish even notes that Gerwin, in his deposition, seemed to accidentally disclose that he was aware that, in fact, it was the board who was selecting who should receive these contracts. *Id.* p. 19.

Cornish notes that Gerwin had no supervision in performing his audit as required by the generally accepted auditing standards. *Id.* p. 20. Furthermore, Gerwin committed by written memorandum to Richard Lindsay that he would include Lindsay's comments in the report but his comments were not included. *Id.* p. 20. Cornish found numerous other deficiencies in the audit report which he described over the course of pages. *Id.* pp. 15-28.

Cornish also reviewed each of the payments made by FBM and RHJ to Clay and each of the payments made from Clay to Marshall. *Id.* pp. 28-32. Cornish reported Marshall's financial records showed that during the years 2007, 2008, 2009 and 2010 he received $195,450 in payments from Clay. *Id.* p. 31.

Cornish also performed a review of the campaign finance disclosure reports provided by Marshall under Title 15 of the Election Code between July 1, 2007 and December 31, 2011. *Id.* p. 34. Cornish concludes the campaign finance disclosure reports, "disclose none of the business relationships" at issue in this case. *Id.* Marshall failed to disclose any of the payments from Clay or other emoluments from FBM or RHJ. *Id.*

Cornish reviewed the bank statements for Medford and concluded that on November 7, 2009, Medford wrote a $25,000 check to the Marshall campaign. *Id.* p. 34. The Larry Marshall campaign fund statement indicates that a deposit in the amount of $25,000 was made on November 13, 2009. *Id.* pp. 34-35. However, Cornish reviewed the campaign financial reports from Marshall during this period and no such deposit was made. Cornish also reviewed Marshall's campaign checking account statements from October 28, 2009, to July 1, 2010. *Id.* p. 35. Cornish determined there were $24,322.13 in checks written out either to cash or Larry Marshall which were not reported on the campaign finance reports for this time period. *Id.* There were also additional disbursements from the campaign finance accounts in the amount of $52,658.26 of which there was no documentation to support. *Id.*

Cornish also analyzed the amount of JOC work going to individual JOC contractors. *Id.* p. 35-36. Prior to January 6, 2010, approximately 79 percent of the JOC work was going to contractors who were not making payments to Clay/Marshall. *Id.* "The effect of removing GRG as a JOC contractor substantially increased the amount of work available to RHJ and FBM. *Id.*

Cornish concludes that based on his review of the HISD JOC administration records, "it is my opinion based upon the totality of my review, that the John Gerwin 'audit' report was intentionally used at the audit committee meeting to pull the agenda item renewing GRG's JOC contract so that a new RFP would be issued resulting in the selection of preferred vendors to the exclusion of GRG." *Id.* p. 36.

Cornish further concludes, based in part on the deposition of HISD Officer Daryl Bailes, "FBM had worse performance issues than GRG." *Id.* p. 36. Despite this, FBM was issued a new JOC contract in 2010 when GRG was not. *Id.* Also according to Bailes, GRG beat out FBM on every job they bid that involved Bailes. *Id.* Cornish concludes based on the records that GRG was providing a better value to the district in contravention to the audit report conclusion of Gerwin. *Id.*

Cornish also reviewed the records of Clay. He concluded (1) there are no regularly scheduled meetings, (2) no written work product was produced, (3) no e-mail correspondence was noted, (4) no time logs existed, and (5) my review of the depositions of Joyce Moss-Clay, Eva Jackson and Pete Medford contained no adequate explanations of the work performed which would justify such monthly fees." *Id.* pp. 36-37. Finally, Cornish notes that "the monthly invoices were boiler plate and contained no specific details of activities undertaken." *Id.*

Cornish notes the records indicate that scope of work estimates prepared by GRG were then forwarded to other JOC contractors to use in preparing their bids. *Id.* p. 37. This practice is inappropriate under the JOC system as recognized by HISD personnel. *Id.*

Cornish also reviewed the documentation supporting the 2010 JOC rebid. Cornish concludes these rankings were determined in large part by pricing coefficients. *Id.* p. 37. Using pricing coefficients to determine the rankings makes little sense since each JOC contractor was asked to accept the contract under the same pricing coefficients. Cornish

further noted that two of the four committee members disagreed with the results because Jamail & Smith had unacceptable financial review and very low MWBE score. *Id.* Eglin advised the two committee members Jamail & Smith would be selected regardless of the unacceptable review because of its high ranking pricing coefficients. *Id.* These scorings are further suspect because RHJ was given a high marks on past experience and work history with the district even though at the time the recommendation was made RHJ had only completed one JOC project for HISD. *Id.* KBR was given high marks on its past performance ranking even though it took eight months of a 12-month contract to negotiate the terms of the contract. *Id.* Lastly, Cornish notes there is no explanation or documentation provided as to why HISD reduced the number of JOC contractors from seven to four when there was still, according to HISD's own records, two to three years and millions of dollars of life and safety project repairs needed in addition to millions of dollars of JOC bond construction funds. *Id.* pp. 37-38.

Finally, Cornish concludes in his review of all the records there is no indication of any meaningful "action to investigate these facts and remediate wrongful behavior." Taken by HISD. *Id.* p. 39.

## III.
## ARGUMENTS AND AUTHORITIES

### A. GRG'S RICO Claim Does Not Fail As a Matter of Law

GRG asserts Marshall has engaged in the substantive violation of § 1962(c) of RICO, which makes it unlawful "for any person employed by or associated with any

enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Section 1962(c) requires proof of three elements: "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *BAC Home Loans Servicing, LP v. Tex. Realty Holdings, LLC*, 901 F. Supp. 2d 884, 918 (S.D. Tex. 2012) (quoting *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007)).

The Supreme Court has "'repeatedly refused to adopt narrowing constructions of RICO'" in favor of "the clear but expansive text of the statute." *Boyle v. United States*, 556 U.S. 938, 950 (2009) (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008)). The RICO statute itself "provides that its terms are to be 'liberally construed to effectuate its remedial purpose.'" *Id.* at 944 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 941 (1970), note following 18 U.S.C. § 1961). Section 1962(c) plainly provides that a "person," which includes an entity that is "capable of holding a legal or beneficial interest in property," 18 U.S.C. § 1961(3), may be held liable for participating, "directly or *indirectly*," in the conduct of an enterprise's affairs through a pattern of racketeering activity, *id.* § 1962(c) (emphasis added).

**1. <u>It Is a Question of Disputed Fact Whether GRG Can Demonstrate Damages</u>**

Marshall's first argument for summary judgment is based on the causation element of GRG's RICO claims. (Motion, 15). RICO's causation requirement flows from the text

of the statute providing a civil cause of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (the plaintiff has standing under RICO if "he has been injured in his business or property by the conduct constituting the violation"). Section 1964(c) is satisfied when the plaintiff demonstrates proximate cause in the form of "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). The Fifth Circuit held in this case that a fact issue existed as to GRG's RICO damages based on its decline in JOC jobs in 2009. *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.*, 786 F.3d 400, 411 (5th Cir. 2015). Now, Marshall is again moving for summary judgment based on the same damages the Fifth Circuit held adequate to support GRG's RICO claim. As shown below, Marshall's second request for summary judgment should be denied.

**a. <u>GRG's JOC Contract with HISD Was Not Void</u>**

Marshall's first argument is based on his claim that the JOC contract awarded to GRG was void, and thus, GRG could not have formed a legitimate interest in lost profits arising from an unlawfully procured contract. (Motion, 15-16). Marshall already thoroughly advanced this argument to the Court of Appeals but couldn't get it to bite so he is trying again in this Court. Marshall claims that the addition of GRG later in the process was in contravention of Texas law and renders GRG's contract with HISD unlawful. (Motion, 16). Even were that argument not already (at least implicitly) rejected by the Court of Appeals, as shown below, that is not the case. GRG submitted a

bid along with all of the other 2008 JOC applicants, and its inclusion on the list of JOC contractors to be approved by the Board was not unlawful.

Marshall relies heavily on a recent Dallas Court of Appeals case to support its theory that a failure to comply with the competitive bid requirements of Chapter 44 of the Texas Education Code renders a contract void. *TXU Energy Retail Co, LLC v. Fort Bend Indep. Sch. Dist.*, 472 S.W.3d 462 (Tex. App. --- Dallas 2015, n.p.h.).

But Marshall's invalid contract theory misses the mark entirely. Regardless of whether Marshall's claim that the GRG contract was unlawful holds any water, it is irrelevant. Just as the Fifth Circuit recognized in *Gil Ramirez Grp.*, GRG's RICO claim rests on the funds GRG would have received but for Marshall's unlawful interference and the addition of RHJ as a JOC contractor, it is not based on proving the validity of the contract. *Gil Ramirez Grp.*, 786 F.3d at 411. The Court of Appeals opinion directly forecloses the challenge to whether GRG should have had a JOC contract. The fact is, GRG had the contract and it "need not demonstrate legal entitlement." *Id.*

In any event, Richard Lindsay's addition of GRG as a JOC contractor was not unlawful because he provided valid and lawful reasons for the addition. Ex. 126. When Grier questioned Lindsay regarding the addition of GRG, Lindsay provided a written response with legitimate reasons for adding GRG as a JOC contractor: (1) there was a large demand for life and safety repairs due to Hurricane Ike so HISD needed five to six more JOC contractors, Ex. 126; (2) the JOC contractors altogether resulted in four MWBE firms and two other vendors who had extensive JOC experience, Ex. 126; and (3)

the five JOC contractors which were not selected out of the original 11 applicants in 2008 were disqualified for missing paperwork, potential conflicts of interest, insufficient MWBE goals or lack of local office. Ex. 126. Further, each of the JOC contractors later agreed to lower and use the same pricing coefficient. Ex. 126. What is more the 2008 bid process was conducted in a manner to avoid undue influence not to be subjected to undue influence. *Id.*

What Marshall is attempting to do is attack GRG's JOC contract, years after the fact, to try and close off these claims. As shown above, the argument fails. However, if the Court decides otherwise, at best all Marshall has inserted into the case is another fact issue for the jury to consider as to the appropriateness of GRG's 2008 award.

**b. <u>The Fifth Circuit Found a Fact Issue as to GRG's Damages Due to the Decline in Jobs Assigned to GRG After RHJ was Improperly Added as a JOC Contractor</u>**

Next, Marshall argues that GRG failed to identify what business it allegedly lost as a result of RHJ's addition as a JOC contractor. (Motion, 20). This is the same argument Marshall made in its first summary judgment motion and the Fifth Circuit found unpersuasive. The "speculative" damages argument is, of course, standard fare for many defendants, who fail to appreciate that the rule that "damages are not permitted which are speculative in nature . . . serves to preclude recovery . . . only where the *fact* of damage is uncertain, i.e., where the damage claimed is not the certain result of the wrong, not where the *amount* of damage is uncertain." *Clearline Techs. Ltd. v. Cooper B-Line, Inc.*, No.

Civ. A. H-11-1420, 2013 WL 2422581, at *10 (S.D. Tex. June 3, 2013) (court's emphasis) (internal quotation marks omitted).

As the Fifth Circuit noted in its opinion, GRG was assigned more work than any other contractor in the initial period of the 2009 JOC program, and GRG won 42 of the 64 projects it bid on in 2009. *Gil Ramirez Grp*., 786 F.3d at 411; *see* Ex. 50. After RHJ was improperly added as a JOC contractor, GRG suffered a significant drop off of assignments. *Id*.; Ex. 47 and 50. Further, GRG offered evidence to support HISD considered RHJ as a "replacement contractor" for GRG. *Id*.; *see also* Ex. 74 and Ex. 169, p. 31, ll. 10-23. Lastly, Plaintiffs' CPA expert, Ransom Cornish, J.D., C.P.A. provided his opinion that if GRG had continued to receive work at the same rate as it did the first few months, it would have been awarded much of the JOC expenditures. *Id*.; *see* Ex. 50.

This evidence is more than sufficient to at least create a genuine issue of material fact as to whether GRG was damaged by Marshall's RICO violations, a conclusion directly reached by the binding Court of Appeals decision.

**2. <u>It is a Question of Fact Whether GRG Can Prove Marshall Proximately Caused GRG's Damages</u>**

Moving on, Marshall argues that GRG has no evidence to support Marshall proximately caused GRG's injuries. (Motion, 22). Marshall fails to explain how the report of Plaintiffs' CPA expert, Ransom Cornish, which describes in detail the evidence supporting causation of damages and further calculates in detail the amount of such damages does not alone create a fact issue. Ex. 50. To the contrary, the evidence shows Marshall pressured HISD employees to add RHJ to the list of JOC contractors and

replace GRG. Prior to RHJ being added, GRG was assigned more work than any other contractor in the initial period of the 2009 JOC program, and GRG won 42 of the 64 projects it bid on in 2009. Ex. 50. After RHJ was improperly added as a JOC contractor, GRG suffered a significant drop off of assignments. Ex. 50. Further, GRG offered evidence to support HISD considered RHJ was a "replacement contractor" for GRG. Ex. 74.

Marshall argues that third parties managed HISD's JOC job assignments, and thus, Marshall was not responsible for the decrease in jobs assigned to GRG. (Motion, 23). First, Marshall was receiving payments from HISD vendors including A.O. Phillips an engineering project manager. Ex. 8. There is evidence starting from 1999 through 2010 that Marshall knew how to manipulate HISD employees in order to make certain that contractors who enriched him received contracts. Why else would the contractors pay Clay for allegedly very little to no services, Clay share with Marshall a large percentage of the payment, and then accordingly all of the paying contractors end up with contracts with HISD? A jury could reasonably conclude that the paying contractors were getting their money worth. Medford's lengthy description of the pay to play process with Marshall in the Dolcefino recording reveals that "nothing gets done" without knowing how to play the game.

Most importantly, Marshall's influence was a direct cause of RHJ being added as a JOC contractor, which obviously expanded the universe of contractors available to the third party managers for job assignments and, thus, clearly harmed GRG's ability to

receive job assignments. Marshall was paid by RHJ through Clay to add RHJ as a JOC contractor. Exs. 3, 4, 8. He did everything in his power to get RHJ added as a JOC contractor. RHJ was initially disqualified from the JOC applicants due to the pending lawsuit. Ex. 161, p.50, ll. 1-4, ii. 22-25, p. 49, ll. 1-12. Jackson lied about the lawsuit and failed to properly disclose it. Ex. 161, p. 50, ll. 1-12, p. 53, ll. 3-17. However, Marshall ensured that RHJ was added as a JOC contractor in August 2009 despite the failure to disclose and nine months after the 2009 JOC contractor application process had been closed in November 2008. Ex. 19. Although another contractor, Heery International, disclosed the fact that it was involved in a pending lawsuit in another district, the contractor was disqualified completely from the application process. The evidence shows that Marshall was constantly applying pressure Dr. Saavedera, his wife, and others until Dr. Saavedera finally gave in immediately before he resigned. Ex. 158, p. 41, ll. 1-16, p. 44, ll. 15-25, p. 45, ll. 1-21, p. 120, ll.11-25, p. 121, ll. 1-9; Ex. 163, p. 111, 22-25, p. 12, l. 1, p. 14, ll. 5-8, 13-25, p. 15, l. 1, p. 16, ll. 22-24.

Moreover, the evidence also shows that Marshall's influence also took GRG out of the running for new JOC jobs after Ramirez refused to pay Marshall. The evidence shows Marshall and Aguirre met several times during that time period. Ex. 137-138. Aguirre advised Ramirez to start paying Clay and thus Marshall in order to start receiving JOC jobs again. Ex. 99. Further, it is credible that Aguirre would be a middle man in a bribery scheme in light of the questionable business dealings between ABM Janitorial

(multi-million dollar HISD vendor) and Aguirre's company Accel and JMC and Marshall. Ex. 8, 132, 140, 141, 142, 143.1, 143.2 and 209.

Accordingly, GRG has sufficient evidence to raise a fact issue regarding proximate cause and to support submitting the issue of proximate cause to the fact finder for determination at trial.

### 3. It Is a Question of Fact Whether GRG Can Prove Marshall Engaged in the Predicate Acts Needed to Make Out the Pattern of Racketeering Activity to Support His RICO Claim

Marshall next argues that GRG cannot raise genuine fact issues as to whether Marshall committed a predicate act under the RICO statute. (Motion, 28). Again, this is an argument previously raised by Marshall in his first request for summary judgment. GRG asserts Marshall has engaged in the substantive violation of section 1962(c) of the RICO statutes, which makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity [.]" 18 U.S.C. §1962(c). Section 1962(c) requires proof of three elements: "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *BAC Home Loans Servicing, LP v. Tex. Realty Holdings, LLC*, 901 F. Supp. 2d 884, 918 (S.D. Tex. 2012) (quoting *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007)). Marshall's request should be denied for the same reasons Plaintiffs' argued in their first response.

A "pattern of racketeering activity" requires "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5). These predicate acts of "racketeering activity" are defined by reference to a laundry list of prohibited activities. *See id.* § 1961(1). The "several criminal acts" committed by the Defendant are part of what it takes to prove a "pattern of racketeering activity" requiring "at least two acts of racketeering activity" within a 10-year period. 18 U.S.C. § 1961(5). The plaintiff must also prove that the acts of "racketeering activity," satisfy the elements of "continuity plus relationship" *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). But Marshall has not questioned those elements, arguing only that GRG cannot establish that Marshall engaged in any of the predicate acts of racketeering activity alleged with RHJ and/or JM Clay and Associates. Accordingly, Plaintiffs will demonstrate genuine issues of material fact exist as to RHJ, JM Clay and Associates, and Marshall's involvement in each of the criminal acts alleged.

**a. <u>It is a Question of Fact Whether GRG Can Prove Marshall Engaged in the Predicate Acts Needed to Make Out the Pattern of Racketeering Activity to Support Its RICO Claim</u>**

**i. <u>It Is a Question of Fact Whether Marshall Engaged in the Predicate Act of Bribery Under 18 U.S.C. § 201</u>**

One predicate act listed in 18 U.S.C. § 1961(1)(B) is bribery under 18 U.S.C. §201. The federal bribery statute makes it a crime for a "public official" who

> directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; [or] . . . (C) being induced to do or omit to do any act in violation of the official duty of such official or person[.]

18 U.S.C. § 201(b)(2)(A), (C) (formatting omitted). Marshall argues that he cannot have violated § 201 because he is not a "public official," which is defined to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government." *Id.* § 201(a)(1).

The Supreme Court has indicated that this "broadly-drafted" definition should not be given a "cramped reading" but, instead, be interpreted broadly as applying "to all persons performing activities for or on behalf of the United States, whatever the form of delegation of authority." *Dixson v. United States*, 465 U.S. 482, 496 (1984); *accord United States v. Wilson*, 408 F. App'x 798, 806 (5th Cir. 2010) (not selected for publication) ("Congress intended the bribery statute to be applied broadly."), *cert. denied*, 131 S. Ct. 3059 (2011); *United States v. Hernandez*, 731 F.2d 1147, 1149 (5th Cir. 1984) ("Section 201 is to be broadly construed in order to effectuate its legislative purpose of deterring corruption."). Accordingly, to determine "whether any particular individual falls within this category, the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities." *Dixson*, 465 U.S. at 496. In other words, "[t]o be a public official under section 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy." *Id.* at 499. For example, the Court held in

*Dixson* that the executive director responsible for the "general supervision" of a local social service organization that administered federal block grant funds was a "public official" under section 201 because he was responsible for distributing "federal fiscal resources." *Id.* at 484, 497.

Moreover, an individual need not "have any authority to allocate federal resources" to be considered a "public official" under section 201. *United States v. Thomas*, 240 F.3d 445, 448 (5th Cir. 2001) (prison guard employed by a private company contracted by the federal Immigration and Naturalization Service qualified as a "public official"). Rather, the touchstone is whether the defendant's job carries with it a "significant measure of public trust." *Wilson*, 408 F. App'x at 806; *Thomas*, 240 F.3d at 447.

As Marshall admits, this Court previously recognized Marshall could be considered a public official if he occupied a position of public trust with official federal responsibilities. (Motion, 32). Marshall was the President of the Board of Trustees of HISD, a public entity charged with administering federal funds received through a variety of programs, including Title I, II, and III funds provided for students qualifying for free or reduced-price lunches; grants for special education programs; stimulus funds under the American Recovery and Reinvestment Act; E-Rate funds allocated by Congress for purchase of classroom and educational technology; and FEMA money used for repairs made by the JOC contractors in 2008 through 2010 for hurricane damage. Given the significant measure of public trust invested in Marshall as the head of an entity receiving

so much federal money, it makes no difference whatsoever whether Marshall was actually "involved in any decision regarding how federal funds were spent." (Motion, 33); *See Thomas*, 240 F.3d at 448 ("Although he did *not* have any authority to allocate federal resources, Thomas nevertheless occupied a position of public trust with official federal responsibilities, because he acted on behalf of the United States under the authority of a federal agency which had contracted with his employer." (court's emphasis) (citation omitted)). Even if it must be shown that Marshall's transgressions here were undertaken with respect to federal funds, Plaintiffs have raised a fact issue as to whether JOC contractors received FEMA and/or E-Rate funds. Exhibit 94 pages 1, 18 and 51. There is no question but that Marshall is a "public official" for purposes of the federal bribery statute.

Marshall also argues that GRG cannot prove bribery under § 201 because there is no proof that the "consulting" fees that RHJ and FBM paid to Clay, who then relayed a substantial chunk of the fees to Marshall, were in return for an exercise of his official power that benefited RHJ and FBM. Marshall claims that the payments by RHJ and FBM were not to bribe Marshall into awarding them work but to pay Clay "consulting" fees for work she actually did for them, which fees Clay then shared with Marshall supposedly for his mentorship to Clay in connection with her business. (Motion, 34).

First, Marshall's explanation is belied by Medford's statements specifically describing the pay-to-play scheme at HISD. Second, Marshall's statements are belied by the substantial evidence that Clay actually did nothing for the payments; there were no

time sheets, no longs, no work product, and no tangible evidence of any work performed. Whatever the Court thinks of this significant evidence, a fact remains to be tried.

Additionally, Marshall argues that the timing of the termination of the contract with RHJ and the award of the RHJ's JOC contractor status negate an inference that the payments made to Clay were intended to be bribes to influence Marshall. (Motion, 38-39). To the contrary, the timing establishes that the payments to Clay were related to Marshall obtaining a contract for RHJ. RHJ fired Clay a few days after the board did not award it a JOC contract in November 2008. Ex. 18. Yes, there was no ongoing relationship at the time that RHJ was added as a JOC, but after the 2010 JOC contract was secured, RHJ started up the "consulting" agreement with Clay again. The jury could infer that Marshall was trying to make up for failing to secure the position RHJ previously paid for by "hiring" Clay, in order to secure further kickbacks from RHJ again in the future.

Marshall, of course, seeks to limit the damage done by Medford's statements, arguing that they do not prove that Marshall himself agreed to take any official action on behalf of FBM or RHJ in exchange for the payments made by FBM and RHJ. Marshall also objects to Plaintiffs' evidence in support of bribery. (Motion, 40). But, as stated above, the hearsay rule does not prevent the admission of the statements set forth in the facts herein because each and every "hearsay" statement to which Marshall objects is either not hearsay under the rule or falls under one of the hearsay exceptions. GRG has demonstrated time and again in this case that the corruption of HISD runs deep, making it

difficult for Plaintiffs to find willing witnesses to speak out directly regarding the corruption (especially in light of how many people were involved). It is for this reason that Plaintiffs seek a trial where witnesses sitting in a federal court and before a federal jury can be adequately encouraged to tell the truth. At least a dozen witnesses reluctant to come forward, under a trial subpoena are expected to testify. Should this Court let the jury hear this case, there is no doubt damning additional evidence will come into the record. Nonetheless, despite elaborate attempts to cover up this widespread corruption, GRG has uncovered ample evidence to create a fact issue for trial. *See e.g.*, Exs. 1-4, 8, 9-16, 22-25, 27-28, 31, 44-46, 48, 57, 65, 81, 86-87, 199-201. Indeed, the Court of Appeals decision indicates this case has fact questions to be tried.

Again, it is not the Court's role at this stage of the proceeding to make credibility determinations or weigh the competing evidence presented by the parties; rather, all factual controversies are to be resolved in GRG's favor, and the facts and the inferences drawn from the facts must be reviewed in the light most favorable to GRG. *Southwestern Bell Tel. Co. v. Fitch*, 801 F. Supp. 2d 555, 564 (S.D. Tex. 2011). So viewed, there is more than enough evidence to at least create a genuine issue of material fact as to whether Marshall agreed to a quid pro quo with RHJ and FBM. The Court of Appeals opinion is clear on this point: GRG has raised at least a triable issue of fact regarding Marshall's system of bribes in the JOC awards.

**ii. <u>It Is a Question of Fact Whether Marshall Engaged in the Predicate Act of Bribery Under the State Bribery Statute</u>**

In addition to the federal crimes listed in 18 U.S.C. § 1961, predicate acts under RICO also include "any act or threat involving . . . bribery . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A). Under Texas law, it is a crime punishable by imprisonment of more than one year for a person to intentionally or knowingly solicit, accept, or agree to accept from another:

> (1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter; [or]
>
> (4) any benefit that is a political contribution as defined by Title 15, Election Code, or that is an expenditure made and reported in accordance with Chapter 305, Government Code, if the benefit was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion if such exercise of official discretion would not have been taken or withheld but for the benefit; notwithstanding any rule of evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subdivision.

TEX. PENAL CODE § 36.02(a)(1), (4). GRG pleaded the violation of section 36.02 as a predicate act in the Fourth Amended Complaint at the Court's suggestion. Dkt. 179, pp. 15-16 ("It appears to this Court that the facts as pled are chargeable as an offense under TEX. PENAL CODE § 36.02.

Marshall nonetheless has again asserted that GRG cannot establish a predicate act under section 36.02 "for the same reasons that GRG cannot, as a matter of law, establish a predicate act under 18 U.S.C. § 201." This is not true, of course, as the Texas bribery statute does not include any requirement that the bribe-taker be a public official acting for

or on behalf of the United States. Marshall also suggests that the Texas statute sets a higher standard by requiring "proof of an express agreement to exchange consideration for official action." (Motion, 44-45) (citing *McCallum v. State*, 686 S.W.2d 132 (Tex. Crim. App. 1985).) But the case on which Marshall relies, *McCallum* was later criticized in *Martinez v. State*, 696 S.W.2d 930 (Tex. App.—Austin 1985, pet. denied), which held that

> where it is alleged the accused offered or solicited a benefit as consideration for an official act, it is not necessary for the State to prove the party to whom the offer or solicitation was made accepted the proposition or even understood the unlawful nature of the proposition; proof that the offer or solicitation was made by the accused with the purpose to promote or facilitate the exchange of the benefit for the official action is all that is required.

*Id.* at 933 & n.2; *see also United States v. Traitz*, 871 F.2d 368, 386 (3d Cir. 1989) (in light of *Martinez* limiting and calling into question the reasoning of *McCallum* as applied to the similar Model Penal Code, "*McCallum* has little value as persuasive authority").

In any event, GRG has offered more than enough proof to at least create a question of fact as to whether Marshall intentionally or knowingly solicited, accepted, or agreed to accept from RHJ, FBM, and others a bribe in exchange for favorable consideration by HISD in awarding JOC contracts and work.

#### iii. It Is a Question of Fact Whether Marshall Engaged in the Predicate Acts of Mail and Wire Fraud Under 18 U.S.C. §§ 1341 And 1343

Mail and wire fraud are also predicate acts of racketeering activity under RICO. *See* 18 U.S.C. § 1961(1)(B). The federal mail fraud statute provides that

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

*Id.* § 1341. The wire-fraud statute similarly provides that

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

*Id.* § 1343. Under either statute, the term "scheme or artifice to defraud" includes "a scheme or artifice to deprive another of the intangible right of honest services." *Id.* § 1346. The Supreme Court has expressly held that "honest services" fraud applies to bribery and kickback schemes. *See Skilling v. United States*, 130 S. Ct. 2896, 2931 & n.42 (2010). Thus, Marshall can be charged with a violation of 18 U.S.C. § 1343 based on his acceptance of bribes from RHJ, FBM, and other Defendants, as this Court as already noted. *See* Dkt. 179, p. 17.

Marshall's argument that he cannot have engaged in mail or wire fraud once again relies on his spurious claim that GRG cannot prove, or at least raise an issue of fact

regarding whether, Marshall took bribes. In particular, Marshall contends that "the consulting arrangements of which Plaintiffs complain are legitimate business dealings permitted under Texas law and there is no evidence that they were used as vehicles to facilitate bribery[.]" As already noted, however, there is copious evidence, including Medford's statements, to show that the money paid to Marshall, through Clay, was, in fact, intended as bribes. One *must* assume Medford's statements are true, notwithstanding Marshall's denial, in reviewing his motion for summary judgment. Thus, Marshall also makes the unsupported assertion that there is no evidence that any of his communications concerning the bribery scheme, or his acceptances of payments pursuant to the scheme, were transmitted by interstate wire. This argument is flatly is rebutted by the Wilson expert report. Ex. 204.

Even if there were no evidence of interstate wire activity, Marshall does not deny that there is plenty of evidence the bribery scheme was also carried out by use of the mail. Indeed, Marshall testified that his payments from Clay came through the mail. Ex. 153, pp. 59-60. As such, there is at the very least a genuine issue of material fact as to whether Marshall engaged in multiple predicate acts of mail fraud.

**iv. <u>It Is a Question of Fact Whether Marshall Engaged in Predicate Acts in Violation of the Travel Act, 18 U.S.C. § 1952</u>**

This same evidence is also sufficient to create a question of fact as to whether Marshall engaged in predicate acts in violation of the Travel Act, 18 U.S.C. § 1952. *See* 18 U.S.C. § 1961(1) (B). The Travel Act provides, in relevant part, that "[w]hoever uses the mail or any facility in interstate or foreign commerce, with intent to . . . promote,

manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform" such an act shall be fined, imprisoned not more than five years, or both. *Id.* § 1952(a)(3). "Unlawful activity" under the Travel Act is specifically defined to include "bribery . . . in violation of the laws of the State in which committed or of the United States." *Id.* § 1952(b) (2). Intrastate mailings satisfy the jurisdictional requirement of the Travel Act. *See United States v. Marek*, 238 F.3d 310, 317 (5th Cir.), *cert. denied*, 534 U.S. 813 (2001); *United States v. Heacock*, 31 F.3d 249, 255 (5th Cir. 1994).

Marshall's argument on the Travel Act, once again, essentially boils down to denying that there is any evidence that he engaged in a bribery scheme. As laid out above, however, there is plenty of evidence at this point that Marshall used the mail to carry on the unlawful activity of bribery in violation of state and federal law. As such, the same evidence showing that Marshall engaged in the predicate acts of mail fraud under 18 U.S.C. § 1341 and bribery under 18 U.S.C. § 201 and TEXAS PENAL CODE § 36.02 also supports GRG's claim that Marshall violated the Travel Act.

### v. It Is a Question of Fact Whether Marshall Engaged in Predicate Acts of Money Laundering Under 18 U.S.C. §§ 1956 and 1957

Violations of 18 U.S.C. §§ 1956 and 1957 also constitute predicate acts of racketeering activity under RICO. *See* 18 U.S.C. § 1961(1)(B). Section 1956 prohibits money laundering, which occurs when a person, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of

specified unlawful activity with the intent to promote the carrying on of specified unlawful activity." *Id.* § 1956(a)(1)(A)(i).

To establish money laundering under this provision, it must be shown that the defendant "(1) knowingly conducted a financial transaction; (2) which involved the proceeds of an unlawful activity; and (3) with the intent to promote or further unlawful activity." *United States v. Dovalina*, 262 F.3d 472, 475 (5th Cir. 2001). Section 1957 makes it a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." 18 U.S.C. § 1957(a). The elements of this offence are "(1) property valued at more than $10,000 that was derived from a specified unlawful activity, (2) the defendant's engagement in a financial transaction with the property, and (3) the defendant's knowledge that the property was derived from unlawful activity." *United States v. Fuchs*, 467 F.3d 889, 907 (5th Cir. 2006). In both §§ 1956 and 1957, the term "specified unlawful activity" includes any offense constituting a predicate act under 18 U.S.C. § 1961(1), such as bribery. *See* 18 U.S.C. § 1956(c)(7); *id.* § 1957(f)(3) (defining "specified unlawful activity" by reference to 18 U.S.C. § 1956).

The Court previously held that payments to Clay could not constitute money laundering under § 1956 because they did not yet involve the proceeds of unlawful activity. Dkt. 229, p. 19. However, the Court was careful to point out that its opinion "should not be read to hold that Clay's transfer of FBM's payments to Marshall necessarily does not involve the 'proceeds of some form of illegal activity'" under §

1956." Dkt. 229, p. 19 n.14. Thus, the Court noted, without deciding, that "[i]t is possible and perhaps even likely, that funds Clay received became the proceeds of bribery immediately upon FBM's transfer of the funds to her. If so, her transfer of these funds to Marshall may constitute money laundering." Dkt. 229, p. 19 n.14.

Addressing that part of the Court's opinion, Marshall now argues that GRG cannot establish the *mens rea* element of section 1956 because there is no evidence that Jackson or Medford knew that "a portion of the payments made to Clay were being forwarded to Marshall" or that "Marshall engaged in any acts of unlawful activity." (Motion, 52). To the contrary, Medford's statements in the recordings and the other scant evidence of actual work by Clay can lead a reasonable juror to conclude that payments to Clay, who did little no work and had nothing to offer by way of service other than influence with Marshall, were intended to be bribes.

In any event, it is unclear what difference the intent of Jackson or Medford makes in this analysis when the relevant intent is that of Marshall in taking bribes initially paid to Clay with the intent of promoting or furthering additional criminal activity. Questions of intent are, of course, uniquely within the realm of the trier of fact as they depend on the credibility of the witnesses and the weight to be given to their testimony, *see, e.g.*, *Hernandez v. Lasko Prods., Inc.*, No. 3:11-CV-1967-M, 2012 WL 4757898, at *6 (N.D. Tex. Oct. 5, 2012), which at this stage are issues that must be resolved in GRG's favor. Marshall's intent to promote or further additional criminal activity is not an issue under section 1957, which requires only that the defendant engage in a monetary transaction in

property criminally derived from an unlawful activity, without regard to any such intent. Although Marshall claims that there is nothing to prove that he knew the payments were the product of unlawful activity, GRG's evidence concerning the bribery scheme is to the contrary. And the evidence also establishes the $10,000 element of section 1957. As such, there are questions of fact concerning whether Marshall engaged in predicate acts in violation of 18 U.S.C. §§ 1956 and 1957 that preclude the entry of summary judgment at this time.

**vi. It Is a Question of Fact Whether Marshall Engaged in Predicate Acts of Retaliation Under 18 U.S.C. § 1513(b)**

Finally, Marshall's last argument for summary judgment on predicate acts under the RICO statutes focuses on GRG's retaliation claim under 18 U.S.C. § 1513(b). (Motion, 48). Marshall claims that GRG has no evidence to support Aguirre told Ramirez that GRG needed to hire Clay nor did Aguirre suggest that Marshall sent him to deliver the message regarding payment to Marshall via Clay. (Motion, 49). Of course, this argument ignores the testimony of Ramirez, which itself is sufficient to create a fact issue. Again, Marshall asks the Court to make credibility determinations as to Ramirez's testimony. As stated above, it is not the Court's role at this stage of the proceeding to make credibility determinations or weigh the competing evidence presented by the parties; rather, all factual controversies are to be resolved in GRG's favor, and the facts and the inferences drawn from the facts must be reviewed in the light most favorable to GRG. *Sw. Bell Tel. Co.*, 801 F. Supp. 2d at 564. Accordingly, Plaintiffs have sufficient evidence to raise a fact issue with regard to retaliation under 18 U.S.C. § 1513(b).

**b. It is a Question of Fact Whether GRG Can Prove Marshall Participated in the Acquisition, Establishment, Conduct, or Control of a RICO Enterprise**

In addition to claiming GRG has no evidence to support predicate acts under the RICO statutes, Marshall also suggests that GRG has no evidence in support of the third element of Marshall's participation in the "acquisition, establishment, conduct or control of a RICO enterprise." (Motion, 29-30). An "enterprise" is defined to include, among other things, "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Here, GRG has claimed the existence of two association-in-fact enterprises, one involving RHJ and the other FBM. *See* Fourth Am. Compl., Dkt. 181, ¶¶ 123-124. Marshall asserts that "an association-in-fact enterprise must have 'an existence that can be defined apart from the commission of predicate acts.'" (Motion, 24) (quoting *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989)). However, while it is true that an enterprise must have some "structure," the Supreme Court has since clarified that the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise may "coalesce." *Boyle*, 556 U.S. at 947; *see also id.* at 951 ("[P]roof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise."). The Court in *Boyle* specifically approved a jury instruction that "the existence of an association-in-fact enterprise is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." *Id.* at 951. As such, it is still fair to say that "if the individuals associate together to commit several criminal acts, their

relationship gains an ongoing nature, coming within the purview of RICO." *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987). Accordingly, Plaintiffs have shown a sufficient relationship between Jackson, RHJ, Clay and Marshall to support the enterprise element under the RICO statutes.

**4. Because There Are Questions of Fact with Regard to the Predicate Acts Pleaded by GRG, Its Conspiracy Claim Under 18 U.S.C. § 1962(d) Survives As Well**

In addition to the substantive RICO violation under section 1962(c), GRG has also pleaded a conspiracy claim under § 1962(d), which prohibits a conspiracy to violate § 1962(c). *See* 18 U.S.C. § 1962(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."). With regard to GRG's conspiracy claim under RICO, Marshall argues only that the conspiracy claim fails because the substantive claim under § 1962(c) fails due to GRG's inability to prove the necessary predicate acts. (Motion, 54); *cf. Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 930 (5th Cir.) (failure to plead the requisite elements of another § 1962 violation implicitly means the plaintiff cannot plead a conspiracy to violate that section under § 1962(d)), *cert. denied*, 537 U.S. 1047 (2002).[9] But GRG's substantive claim under § 1962(c) does not fail at this stage for the reasons stated above. Accordingly, GRG's conspiracy claim under § 1962(d) survives as well.

**5. It Is a Question of Fact Whether Marshall Is Entitled to Qualified Immunity from Plaintiffs' Federal Claims**

[9]The Supreme Court has not definitively resolved the question of whether "a § 1962(d) claim must be predicated on an *actionable* violation of §§ 1962(a)-(c)." *Beck v. Prupis*, 529 U.S. 494, 506 n.10 (2000) (Court's emphasis).

Marshall's claim for summary judgment based on qualified immunity from GRG's federal claim need not detain the Court long. The benefit of qualified immunity is not available to a public official when his conduct (1) violates an actual constitutional or statutory right, and (2) was "objectively unreasonable in light of clearly established law at the time of the conduct in question." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (quoting *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007)). This standard gives room for "mistaken judgments" by protecting all public officials "but the plainly incompetent or those who *knowingly violate the law*." *Id.* (emphasis added) (quoting *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001)).

Here, the summary judgment evidence, viewed in the light most favorable to the Plaintiffs, *see Freeman*, 483 F.3d at 410, is that Marshall knowingly violated state and federal law by taking bribes in his position as President and Board Member of the HISD Board of Trustees. It goes without saying that "the granting of favors in exchange for bribes is not 'objectively reasonable in light of clearly established law.'" *Pedrina v. Chun*, 906 F. Supp. 1377, 1412 (D. Haw. 1995), *aff'd*, 97 F.3d 1296 (9th Cir. 1996), *cert. denied*, 520 U.S. 1268 (1997). As such, because it is a question of fact whether Marshall engaged in bribery, it is also a fact issue whether Marshall is entitled to qualified immunity from GRG's RICO claims. *Id.* If the allegations against Marshall are true, he is clearly not entitled to immunity.

The facts in the record certainly indicate that Marshall has knowingly violated clearly established law. Furthermore, because disputed issues of fact exist which must be resolved in order to decide the qualified immunity question, no jurisdiction exists for another appeal before trial on this question. *Johnson v. Jones*, 515 U.S. 304 (1995). The Court of Appeals opinion found issues of fact for trial and these issues must be resolved in order to determine the question of qualified immunity. Indeed, the Court of Appeals' earlier decision in this case, holding that there was an issue of fact regarding Marshall's bribery activity, entirely forecloses Marshall's argument that Plaintiff's version of the facts is so chimerical that interlocutory review should be allowed. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

**B. GRG'S State Law Claims Do Not Fail As a Matter of Law**

In the last ten pages of the Motion, Marshall argues that GRG's state law claim for tortious interference with prospective business relations and civil conspiracy should be dismissed because Plaintiff failed to exhaust administrative remedies and Plaintiffs have no evidence to support essential elements of their claims. As shown below, neither argument has merit.

**1. GRG Was Not Required to Exhaust Any Administrative Remedies Before Filing Its State Tort Claims Against Marshall**

First, Marshall argues that GRG's state tort claims must be dismissed because GRG failed to exhaust its administrative remedies before bringing the claims against Marshall. (Motion, 59). Marshall points to TEX. EDUC. CODE § 22.0514, which provides that "[a] person may not file suit against a professional employee of a school district

unless the person has exhausted the remedies provided by the school district for resolving the complaint." Marshall contends that HISD's "Public Complaints" policy provides an adequate remedy that GRG should have utilized prior to filing suit against Marshall. *See* Motion, HISD Board Policy GF (Legal & Local), attached as Exhibit AK. First, this entire argument must be considered in light of the fact that the Court of Appeals has already determined that Marshall should not enjoy immunity for Plaintiff's state law claims under other statutes. Second, it is not at all clear that the policy Marshall seeks to cower behind addresses complaints about the sort of behavior engaged in by Marshall in this case. In fact, the policy gives no indication whatsoever what sorts of "concerns and complaints" are covered by the policy, other than it does not apply to complaints concerning educational materials or a commissioned peace officer employed by HISD. Motion, Ex. AK.

Even if the policy purports to apply to acts of deliberate bribe-taking by the head of HISD's Board of Trustees, GRG would still have the benefit of several exceptions to the exhaustion requirement, including that HISD's action in awarding JOC contracts and work based on bribes paid to Marshall was "clearly illegal," *Texas Air Control Bd. v. Travis County*, 502 S.W.2d 213, 216 (Tex. Civ. App.—Austin 1973, no writ), and that exhaustion would have been futile, *see, e.g.*, *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606 (5th Cir. 2007); *Ogletree v. Glen Rose Indep. Sch. Dist.*, 314 S.W.3d 450, 454 (Tex. App.—Waco 2010, pet. denied). With regard to futility, HISD's "Public Complaints" policy outlines a three-level process whereby complaints are made at Level

One to "the appropriate administrator," then appealed to the "Superintendent or designee" at Level Two, before being brought to the Board itself at Level Three. Motion, Ex. AK. But the summary judgment evidence, viewed in the light most favorable to GRG, indicates that none of these steps would have been of any use in this instance. The evidence is that Marshall so dominated the Superintendent and the Board that he got whatever he wanted with respect to the award of JOC contracts and work, to the point where anyone who disagreed with Marshall, such as Dr. Saavedra, was forced out of the job. Moreover, since filing of this lawsuit, each of these HISD levels have participated in a cover up of these activities. As such, there can be no doubt that any attempt to obtain relief based on a complaint concerning Marshall's bribe-taking from the Superintendent or the Board would have been an exercise in futility; at the minimum, there is a fact issue on this point.

A failure to obtain relief from a superintendent or school board can ordinarily be appealed to the State Commissioner of Education. *See* TEX. EDUC. CODE § 7.057; *Ogletree*, 314 S.W.3d at 454. But the commissioner's jurisdiction extends only to appeals by persons aggrieved by "actions or decisions of any school district board of trustees that violate . . . the school laws of this state." TEX. EDUC. CODE§ 7.057(a)(2)(A); *see also id.* § 7.057(a-1) (a person is not required to appeal to the commissioner before pursuing a remedy under a law outside of the Education Code). Because HISD's actions in awarding JOC contracts and work based on bribes paid to Marshall involve violations of the Texas Penal Code and other state and federal laws, the commissioner would not have had any

jurisdiction of any attempted appeal from a Level Three decision by the HISD Board denying relief to GRG, which was a foregone conclusion. Accordingly, GRG was not required to exhaust any administrative remedies that were purportedly available to him through HISD's "Public Complaints" policy.

**2. It Is a Question of Fact Whether Marshall Tortiously Interfered with GRG's Prospective Contractual Relationships**

Second, Marshall argues that Plaintiffs' tortious interference with prospective contractual relationships claim fails as a matter of law. (Motion, 61). A claim of tortious interference with prospective contractual relationships requires the plaintiff to prove (1) a reasonable probability that the parties would have entered into a contractual relationship; (2) the defendant committed an independently tortious or unlawful act that prevented the relationship from occurring; (3) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur as a result of his conduct; and (4) the plaintiff suffered actual harm or damage as a result of the defendant's interference. *See e.g.*, *Faucette v. Chantos*, 322 S.W.3d 901, 914 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Tortious interference with prospective contractual relations includes continuing business relations. *Id.* at 915.

Marshall previously moved for summary judgment on this claim, and the Court granted summary judgment based on the second element. The Fifth Circuit reversed the Court's ruling finding that Plaintiffs raised sufficient evidence to raise a genuine issue of material fact with regard to the requisite mental state element of their claim. *Gil Ramirez*

*Grp*., 786 F.3d at 418. Now, Marshall has moved for summary judgment based on the other elements of Plaintiffs' tortious interference claim.

The evidence described above is more than sufficient to send this claim to trial. The evidence, viewed in the light most favorable to GRG, supports a reasonable probability that HISD and GRG would have entered into additional contractual relationships based on GRG's job performance and the jobs assigned to GRG as a JOC contractor prior to Marshall's interference. See Ex. 50. Further, Marshall committed an independently tortious or unlawful act that prevented the relationship from occurring by effectively replacing GRG with RHJ as a JOC contractor because GRG would not pay Marshall a bribe. Ex. 74. The Fifth Circuit has already found that Plaintiffs raised sufficient fact issues with regard to Marshall's conscious desire to prevent HISD and GRG's relationship from occurring or that Marshall knew that the interference was certain or substantially certain to occur as a result of his conduct. *Gil Ramirez Grp*., 786 F.3d at 418. Lastly, Plaintiffs have presented sufficient evidence that Marshall's actions caused GRG damages in the form of lost JOC job assignments. *See* Ex. 50.

Marshall also argues that as a matter of law, he could not have interfered with any prospective business relationship between HISD and GRG because Marshall is a "lawful representative" of one of the contracting parties. (Motion, 64-65). While it is certainly true that a party cannot tortiously interfere with its own contract, *e.g., Guardian Life Ins. Co. v. Kinder*, 663 F. Supp. 2d 544, 557 (S.D. Tex. 2009), Marshall himself concedes that this principle does not apply where the act of interference was performed by a

representative to "further [his] own interests," *Morgan Stanley & Co. v. Tex. Oil Co.*, 958 S.W.2d 178, 179 (Tex. 1997).

To be sure, it is not enough that the agent have "mixed motives" to benefit himself as well as the entity he represents, as, for example, where the agent's "personal benefit is derivative of the improved financial condition of the corporation or consists of the continued entitlement to draw a salary." *Id.* (quoting *Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995)). However, that is certainly not the case here. HISD needed the work done under the JOC contracts no matter who the contractor was. Marshall did not intervene in the contracting process because he had any interest in seeing that the work was awarded to the best contractor for each job. Rather, Marshall's only interest was in getting the work to his preferred contractors, that is, those contractors who paid him bribes, so that he could continue reaping the financial benefits for himself of taking those bribes. As such, interfering with GRG's prospective business relations with HISD was of no benefit whatsoever to HISD, which fully intended to give additional work to GRG absent Marshall's intervention, but was of considerable benefit to Marshall himself. Accordingly, Marshall is not entitled to summary judgment on GRG's interference claim against him.

### 3. It Is a Question of Fact Whether Marshall Conspired with the Other Defendants

Finally, Marshall's last argument for summary judgment is based on Plaintiffs' state law civil conspiracy claim. (Motion, 65-66). The elements of a civil conspiracy are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the

minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). In denying FBM's motion to dismiss GRG's civil conspiracy claim, the Court opined that GRG's allegations were sufficient to create the inference that Marshall and the other Defendants "had a meeting of the minds and understood that these payments [from RHJ and FBM to Clay] were illegal bribes targeted at ensuring FBM [and RHJ] obtained contracts from HISD." Dkt. 229, p. 27. Marshall now denies there is any evidence to show RHJ and Medford knew Clay was sharing a portion of her "consulting" fees with Marshall as part of the bribery scheme. (Motion, 66). However, the extensive evidence outlined above belies this argument. It is therefore at least a question of fact whether Marshall engaged in a civil conspiracy with the other Defendants.

## IV.

## CONCLUSION

For the foregoing reasons Marshall's Second Motion for Summary Judgment filed in this case should be denied in its entirety.

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs pray the Second Motion for Summary Judgment be in all respects DENIED, for the reasons set forth herein.

Dated this 6th day of January, 2016.

Respectfully submitted,

**BRAZIL & DUNN LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 6, 2016, I electronically provided this document to the attorneys of record.

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